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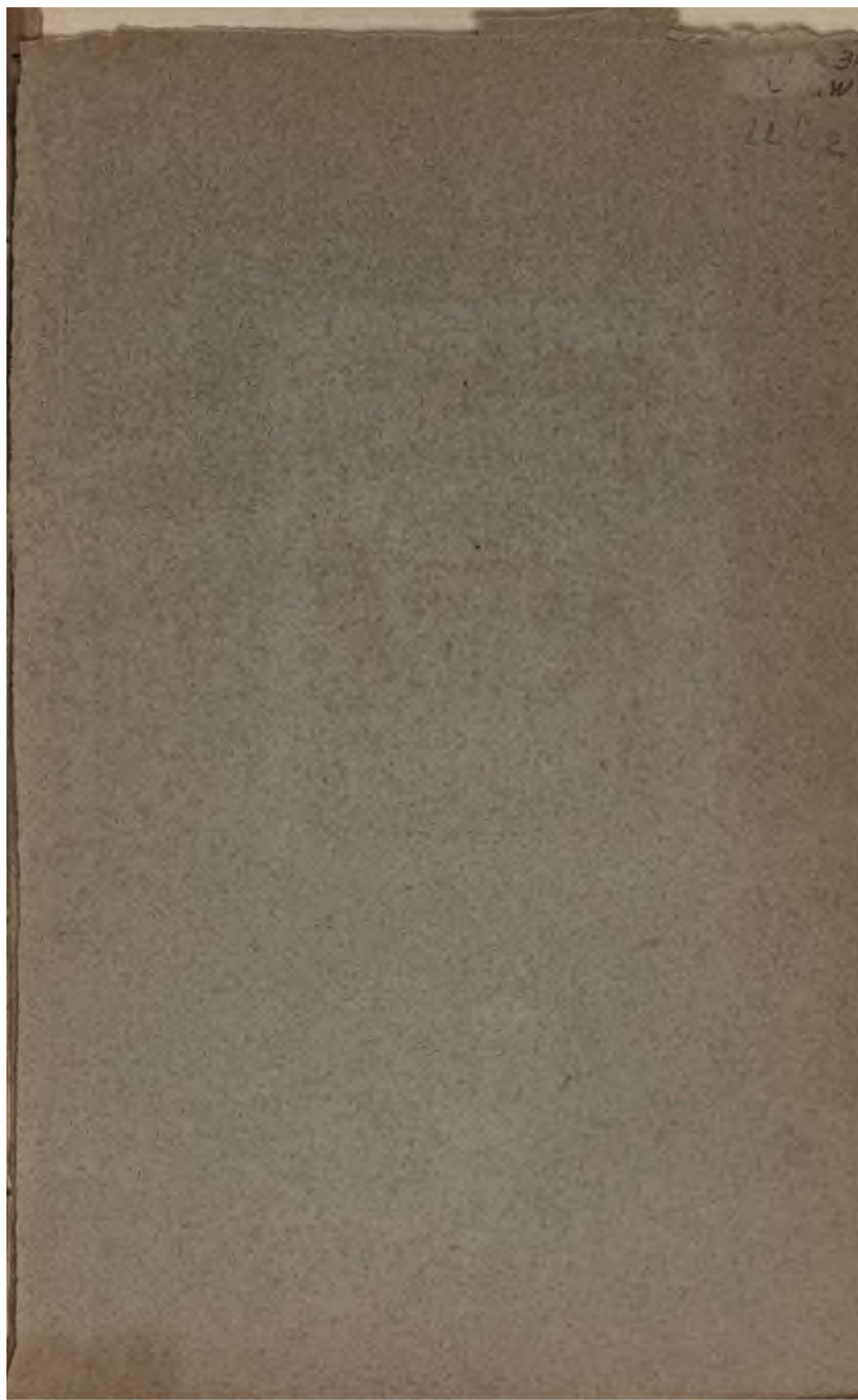
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BULLETIN OF THE UNIVERSITY OF WISCONSIN

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NEW GOVERNMENTS WEST OF THE ALLEGHANIES
BEFORE 1780.

(INTRODUCTORY TO A STUDY OF THE ORGANIZATION AND
ADMISSION OF NEW STATES.)

BY

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Acting Assistant Professor of History, University of Illinois.

*A Thesis submitted for the degree of Doctor of Philosophy in the
Department of History.*

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PREFACE.

When this study was begun in the Seminary of American History and Institutions at Harvard University it was my intention to cover the ground occupied by this monograph in a very few pages, but as the work advanced it became apparent that so short a treatment of the early period would be quite inadequate. Gradually my introduction to the larger study on the establishment and admission of new states assumed this present form.

In the following pages I have aimed to give a fair account of the early attempts to make new governmental establishments in the West, and to show the attitude of the British government toward such establishments. The available data in regard to British policy are not as full as could be desired, but I have tried to judge them fairly and they seem to me sufficient to warrant the conclusions drawn. That there were movements which led the way to the subsequent cutting up of the West into new states, has I think, been made clear.

The materials upon which this paper is based were collected in the Harvard University library and in the library of the Wisconsin State Historical Society. In the latter I found especially valuable the Draper Collection of MSS., to which, by the courtesy of Secretary Reuben G. Thwaites, I had free access.

I desire to express obligations to Professor Albert Bushnell Hart, of Harvard University, by whose sugges-

tion and inspiration I began this study. Professor Victor Coffin, of the University of Wisconsin, and Professor Evarts B. Greene, of the University of Illinois, have given me helpful suggestions. But more than to all others are my thanks due to Professor Frederick J. Turner, the editor of this series, who, by his kindly criticism, helped me to bring this paper to its present form.

GEORGE H. ALDEN.

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NEW GOVERNMENTS WEST OF THE ALLEGHANIES BEFORE 1780.

CHAPTER I.

SCHEMES FOR NEW COLONIES PRIOR TO 1766.

The English colonies in America remained for a century after their establishment in practical ignorance of the land beyond the Alleghany mountains. There was land enough nearer the coast and why should the settler advance beyond that forbidding line which separated civilization from the unknown and desolate wilderness? In 1716, however, Governor Spotswood made his famous ride over the Blue Ridge and made known to Virginians the beauty and fertility of the valley of Virginia. Twenty-two years later Augusta county was created by the Virginia assembly, bounded on the east by the Blue Ridge, and west and northwest by "the utmost limits of Virginia."¹ This marks the first step towards establishing English colonial government west of the mountains.² With the increase of population on the seaboard came an increase in the number of settlers' cabins beyond the mountains; and the increasing interest in western settlement was accompanied

¹ Hening, V., 79.

² In 1718, Sir William Keith, in a report to the Commissioners of Trade (Collection of Papers and other Tracts, p. 196), recommended the establishment of four small inland forts to protect the Indian trade. There was, however, no suggestion of a civil government in connection with them. About the same time Governor Spotswood of Virginia "laid an excellent scheme for extending that trade, and raising fortifications even on the banks of the Lake Erie." It is possible that this plan contemplated the planting of a civil government in the West, but there is no evidence of it. See *State of the British and French Cols. in N. Am.*, p. 109. Cf. *Spotswood Letters*.

by the formation of great land companies, the Ohio Company leading the way in 1747, and obtaining, two years later, a grant of 500,000 acres. In the official instructions to the governor of Virginia in regard to this company, sent doubtless by Lord Halifax, then president of the board of trade, it is set forth that "such settlements will be for our interest, . . . inasmuch as our loving subjects will be thereby enabled to cultivate a friendship, and carry on a more extensive commerce with the nations of Indians inhabiting those parts: and such examples may likewise induce the neighboring colonies to turn their thoughts towards designs of the same nature."¹ The grant was located between the Monongahela and Kanawha rivers on both sides of the Ohio.²

In the same year was organized the Loyal Company, which obtained a grant of 800,000 acres.

Encouraged, doubtless, by the apparent ease with which these two, and other companies secured their extensive grants from the crown,³ and by the expressed attitude of the British government towards western settlement, many schemes were brought forward during the next quarter century for securing similar grants. There seemed to be almost an epidemic of interest aroused in western lands, and new colonial governments, which it was proposed, in many instances to establish.

Probably the earliest public proposition for new colonial governments beyond the mountains of which record remains, was that set forth by the Albany congress of 1754.⁴ The

¹ Franklin's Works, V., 33.

² Dinwiddie papers, I., 17, note. Holmes says the Ohio Company's grant comprised 600,000 acres. Am. Annals, II., 39.

³ That the grants were given by direct order from His Majesty, is shown by letter of Gov. Dinwiddie to Gov. Glenn,—Dinwiddie Papers I., 272; also by S. Sato, Land Question in the U. S., p. 25. Sato gives a good account of the various land companies, pp. 24-25, for which see also Perkins, Annals of the West, pp. 50, 52, 103, 108, 109, 135, 177.

⁴ In 1730 Joshua Gee (The Trade and Navigation of Great Britain Considered, p. 61) wrote concerning the land "back of all our settlements" as follows: "If we have any Sense of the Value of that commodious Tract of Land, it ought to put us upon securing to ourselves such excellent Colonies, which may, if properly improved, bring this

Plan of Union proposed by that Congress, provided that the President General and Grand Council should make all purchases of Indian lands and establish settlements upon them; and also "That they make laws for regulating and governing such new settlements till the crown shall think fit to form them into particular governments."¹ Dr. Franklin, in his notes on the Plan says: "A particular colony has scarce strength enough to extend itself by new settlements at so great a distance from the old; but the joint force of the Union might suddenly establish a new colony or two in those parts . . . greatly to the security of our present frontiers, increase of trade and people. . . . The power of settling new colonies is, therefore, thought a valuable part of the plan."²

Soon after the Albany Congress, Franklin proposes a somewhat definite scheme for two new colonies to be located between the Ohio and Lake Erie. Some of the details are interesting, as showing Franklin's general idea of establishing new colonies. He begins by reciting the advantages to be expected from the establishment of the proposed colonies by way of protection to the frontiers, vantage ground from which to attack the French, and secure friendship and trade with the Indians, besides facilitating English settlement to the Mississippi and Great Lakes. If the old colonies were united "agreeably to the Albany plan they might easily, by their joint force, establish one or more new colonies. . . . But if such union should not

Nation a very great Treasure, and at least build some Forts upon the Apulachean Mountains, to secure us the Right of the Mines contained in them, to protect the Indian and skin Trade." It is just possible to take the expression "such excellent colonies," etc., to refer to new colonies; but from the context it seems more probable that the old colonies are referred to, they being already somewhat menaced by the advance of the French in the west.

¹ Franklin's Works, II., 368. (Unless otherwise stated all references to Franklin's Works are to the Bigelow edition.)

² Franklin's Works, II., 368. Franklin, in the same connection, also advocated the establishment of forts on the great lakes and the Ohio, as they would not only secure the frontiers but "serve to defend new colonies settled under their protection; and such colonies would also mutually defend and support such forts, and better secure the friendship of the far Indians."

take place it is proposed that two charters be granted, each for some considerable part of the lands west of Pennsylvania and the Virginia mountains, to a number of the nobility and gentry of Britain with such Americans as shall join them in contributing to the settlement of those lands." In regard to the government of his proposed colonies, Franklin suggests "that as many and as great privileges and powers of government be granted to the contributors and settlers as his Majesty in his wisdom shall think most fit for their benefit and encouragement, consistent with the general good of the British empire; for extraordinary privileges and liberties, with lands on easy terms, are strong inducements to people to hazard their persons and fortunes in settling new countries. And such powers of government as (though suitable to their circumstances and fit to be trusted with an infant colony) might be judged unfit when it becomes populous and powerful, these might be granted for a term only, as the choice of their own governor for 99 years; the support of government in the colonies of Connecticut and Rhode Island (which now enjoy that and other like privileges) being much less expensive than in colonies under the immediate government of the crown, and the constitution more inviting."¹ Franklin recurs again to his idea of establishing forts to protect the new colonies. A fort at Buffalo Creek on the Ohio, "and another at the mouth of the Tioga, on the south side of Lake Erie," would protect one colony. This is all the clue he gives us as to its location. He is a little more definite in regard to the other. He says, "The river Scioto . . . is supposed the fittest seat for the other colony, there being for forty miles on each side of it, and quite up to its head, a body of all rich land."² We may infer then that Franklin would locate one of his colonies in what is now northwestern Pennsylvania, and northeastern Ohio, and the

¹ For the scheme in full see Franklin's Works, II., 474.

² Franklin adds that this is "the finest spot of its bigness in all North America, and has the particular advantage of sea-coal in plenty."

other on the Ohio river, extending it northwards on both sides of the Scioto. Evidently the exact location of new colonies is a minor question with him at this time. But now, as afterwards, he is quite desirous to have western colonies established and wants to have a part in their establishment himself. In 1756 he wrote to Rev. George Whitfield: "I sometimes wish that you and I were jointly employed by the crown to settle a colony on the Ohio. I imagine that we could do it effectually, and without putting the nation to much expense; but I fear we shall never be called upon for such a service. What a glorious thing it would be to settle in that fine country a large, strong body of religious and industrious people! What a security to the other colonies and advantage to Britain, by increasing her people, territory, strength, and commerce. Might it not greatly facilitate the introduction of pure religion among the heathen, if we could, by such a colony, show them a better sample of Christians than they commonly see in our Indian traders?—the most vicious and abandoned wretches of our nation!"¹

But Franklin was not the only prominent man to advocate new colonies at that time. Thomas Pownall had been a member of the Albany Congress, and Lieutenant Governor of New Jersey. By order of the Duke of Cumberland he drew up in 1756, "A Memorial: Stating the nature of the service in North America, and proposing a General plan of operations, as founded thereon."² He inserts Franklin's scheme as well as one of his own.

Barrier colonies are advocated by Thomas Pownall. In his memorial he says: . . . "wherever our settlements have been wisely and completely made, the French, neither by themselves, nor their dogs of war, the Indians, have been able to remove us. It is upon this fact that I found the propriety of the measure of settling a barrier colony in

¹ Franklin's Works, II., 467.

² Pownall, Administration of the Colonies, Appendix, p. 47.

those parts of our frontiers which are not the immediate residence or hunting grounds of our Indians. This is a measure that will be effectual, and will not only in time pay its expence, but make as great returns as any of our present colonies do; will give a strength and unity to our dominions in North America, and give us possession of the country as well as settlements in it. But above all this the state and circumstances of our settlements render such a measure not only proper and eligible, but absolutely necessary. The English settlements, as they are at present circumstanced, are absolutely at a stand; they are settled up to the mountains, and in the mountains there is nowhere together land sufficient for a settlement large enough to subsist by itself and to defend itself, and preserve a communication with the present settlements. If the English would advance one step further, or cover themselves where they are, it must be at once, by one large step over the mountains with a numerous and military colony. Where such should be settled, I do not now take upon me to say; at present I shall only point out the measure and the nature of it, by inserting two schemes, one of Mr. Franklin's; the other of your memorialist; and if I might indulge myself with scheming, I should imagine that two such were sufficient, and only requisite and proper; one at the back of Virginia, filling up the vacant space between the Five Nations and southern confederacy, and connecting into a one system, our barrier. The other somewhere in the Cohass on Connecticut river; or wherever best adapted to cover the four New England Colonies." Further details of Pownall's scheme do not appear. It is noticeable that the location back of Virginia which he advises for one colony was afterwards taken by the Walpole company, of which he was a member. It is noticeable, too, that Pownall's scheme, as well as Franklin's, provides for more than one colony, each to cover apparently no very large extent of territory. If one or two small colonies had been established west of the mountains, the establishment

of others would easily follow until the whole western country was cut up into colonies. In prominent circles, therefore, back colonies were being considered.

The Albany congress had discussed a plan of union which contemplated the establishment of back colonies; Franklin was exhibiting a great interest in the subject, and was bringing forward more or less definite plans; Thomas Pownall, ready himself with certain propositions for new colonies, was bringing the matter to the attention of the King's brother, the Duke of Cumberland, in a memorial upon colonial administration prepared by order of his royal highness himself. Nor was there a lack of interest on the part of less prominent people. Samuel Hazard, a merchant of Philadelphia, had projected a scheme for a new colony beyond the mountains, and by the spring of 1755, had engaged over 3,500 persons "able to bear arms, to remove to the said new Colony, on the footing of said scheme, and does not in the least doubt of being able to procure 10,000 if it takes effect."¹ He declared then that "among those already engaged are nine Reverend Ministers of the Gospel, a considerable number of persons who are in public offices under the governments of Pennsylvania and New Jersey, as well as great numbers of persons of good estates, of the best characters for sobriety and religion in said provinces, but more especially in the Province of Pennsylvania." Hazard proposed to get "a Grant of so much Land as shall be necessary for the Settlement of an ample colony, to begin at the distance of one hundred miles westward of the Western Boundaries of Pennsylvania, and thence to extend one Hundred Miles to the westward of the River Mississippi, and to be divided from Virginia and Carolina by the Great Chain of Mountains that runs along the Continent from the North Eastern to the South Western Parts of America."²

¹ Hazard's petition to the General Assembly of Connecticut, 4 Amer. Archives, I., 863.

² Hazard's whole "Scheme" may be found in 4 Amer. Archives, I., 861, and in Christopher Gist's Journal, 261. In the latter, however, no hundred mile interval is proposed west of the limits of Pennsylvania.

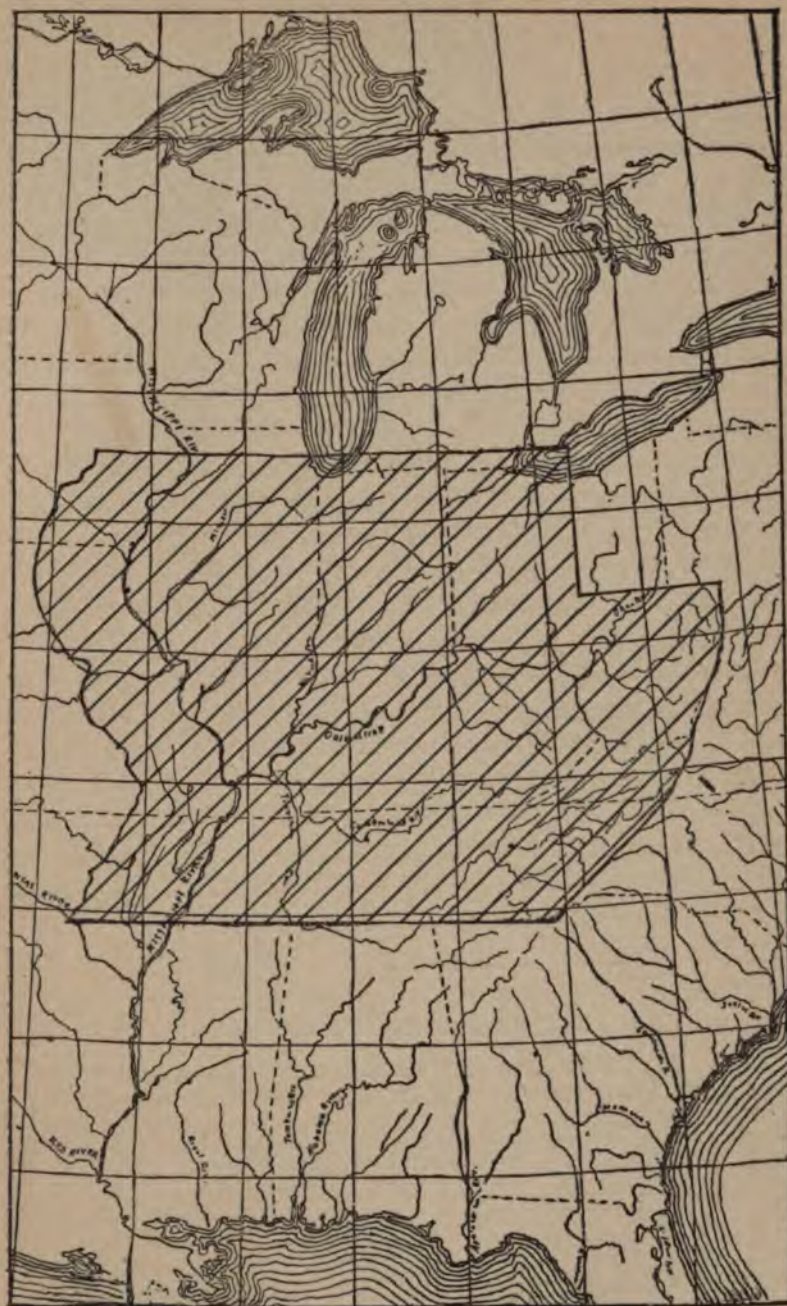
This does not indicate the proposed extent from north to south, unless, indeed, we consider that extent to be indicated by the length of the designated boundary on the east, i. e., from Pennsylvania to Carolina inclusive.¹ That would certainly be "an ample colony" which embraced all the Ohio, and a large part of the Mississippi valleys. Whether it was expected that this colony would be divided and subdivided as it increased in population and diversity of interests we do not know. It is not impossible that the petitioners had little idea of the extent of the territory indicated, as little was commonly known about it at that time.

It was proposed "That humble Application be made to His Majesty for a Charter to erect said Territory into a separate Government, with the same Privileges which the Colony of Connecticut enjoys," and "That application be made to the Assemblies of the several British Colonies in North America to grant such Supplies of Money and Provisions as may enable the Settlers to secure the Friendship of the Indian Natives, and support themselves and Families till they are established."

There is evidence that the design was to establish a Presbyterian colony.² Certainly the religious element was to be very prominent. Only Protestants believing in the divine authority of the Old and New Testaments and the trinity of the Godhead, and with lives and conversations free from immorality and profaneness, could hold office. Roman Catholics were debarred from holding land or having arms or ammunition in their possession, "nor shall any Mass Houses or Popish Chappels be allowed in the Province."

¹ This view is supported by the fact that in the fall of 1755 he made a journey, probably of investigation, "chiefly on the frontiers of Pennsylvania, Maryland, Virginia and North Carolina." Hazard to Pownall, Almon's Remembrancer, III., 133.

² The petition to Connecticut recites that New England, having lands of her own to settle, a new colony would be able to obtain recruits that could be depended upon for fidelity to the king only among members of the Church of England, the Presbyterians, Quakers, and Baptists. The Church of England had shown no disposition to settle colonies in the wilderness. Quakers would not go because "principled against war to remove and defend the country." Baptists were too few. So Presbyterians only remained by whom a new colony could be settled. 4 Amer. Archives, I., 863.



HAZARD'S SCHEME.

The above will sufficiently show what Hazard's plan was. Having drawn up his "Scheme" and being assured of colonists to undertake the settlement, of course his next step was to endeavor to secure the grant. The design seems to have been at one time to petition the General Assembly of Connecticut "to make Application to His Majesty for a Charter" in behalf of the would-be colonists,¹ but it was finally decided to ask Connecticut for nothing more than a relinquishment of her claims upon the desired lands. In May, 1755, a petition to that effect was presented to the General Assembly, and was granted on condition that "the Petitioner obtain his Majesty's Royal Grant and order for settling the said Colony."² Hazard's son relates that his father, after getting this relinquishment from Connecticut, "procured the subscription of between four and five thousand persons, able to bear arms, some of whom were worth thousands,—that he personally explored that part of the country proposed for the situation of the new colony; that he had corresponded with some of the nobility, and with other persons of note and influence in England, who appear to have favoured and encouraged the design; and that having, as he apprehended, brought the scheme to a proper degree of maturity, he proposed embarking for England in the fall of the year, 1758, in order to procure its final accomplishment."³ A petition to the king said there was no doubt that the "Royal wisdom and penetration has discovered the necessity and importance of settling strong and numerous

¹ See the petition in Christopher Gist's Journal, p. 266, "To the Honourable the Governor, Council and Representatives of the Colony of Connecticut," to which "were affixed more than two thousand names."

² Colonial Records of Conn., X., 382, and 4 Am. Archives, I., 865.

³ Memorial of Ebenezer Hazard of New York, 1774, in 4 Am. Archives, I., 865. The son goes on to say that his father's death left the associates "without a guide sufficient to conduct so important an enterprise," but that he himself proposes to take up the Scheme and make "a settlement under the claim and jurisdiction of the colony of Connecticut," so as "not to be obliged to carry the matter to England." He offers to Connecticut £10,000 for the land which he proposes to bound on the west by the Mississippi, and on the east by the western boundary of Pennsylvania. The Connecticut General Assembly, however, rejected his offer, and we hear nothing more of the Hazard Scheme.

Colonies in the neighborhood of the Ohio and Mississippi," and prayed for "such countenance and assistance . . . as will be necessary for the encouragement of a people on whose fidelity your Majesty may with the utmost confidence rely, and who, at the same time, esteem themselves bound by the most sacred and indissoluble ties, to hand down the blessings of civil and religious liberty inviolate to their posterity."¹ This was quite probably intended as a plea for a charter granting a liberal government. Such was what he desired, for we find him writing to Thomas Pownall as follows: "Even the wildest anarchy could hardly be worse than government managed as it frequently has been in the colonies southward of New England. . . . If any schemes be gone into for settling a new colony, I hope things will be put on such a footing as will prevent those jars and contentions between the different branches of the legislature which have almost ruined some of the colonies."²

But enough has been said to show the main points of Hazard's scheme. Whether, if he had lived, he would have succeeded in securing a grant of even a portion of the territory asked for, we are of course unable to say. He himself and his supporters doubtless had faith in the success of the undertaking or they would not have proceeded so far in it as they did. With his death in the summer of 1758 we hear nothing further of his attempt to plant a new colonial government beyond the mountains. In that same year, however, another proposition was made for a new colony.

A few days after the capture of Fort Du Quesne a writer from that place "suggested that the King should grant a charter for a western colony 'with a full liberty of conscience' and a separate governor; and another writer

¹ 4 Am. Archives, I., 863.

² Hazard to Pownall, Jan. 14, 1756, Almon's Remembrancer, III, 134. He tells Pownall that "you will undoubtedly have an opportunity of communicating what has been done to the Earl of Halifax, and such others at the head of affairs as you think proper." This would indicate that Hazard expected assistance from Pownall.

shortly after proposed for it the name of Pittsylvania . . . and that all Protestants who should come under the denomination of King David's soldiers, mentioned by the prophet Samuel, and that everyone that was in distress, everyone that was in debt, and every one that was discontented, should be invited to settle in that 'extraordinary good land.'"¹ This seems to have indicated a movement to establish a new colony from philanthropic motives. So far as we know nothing ever came of the proposition.

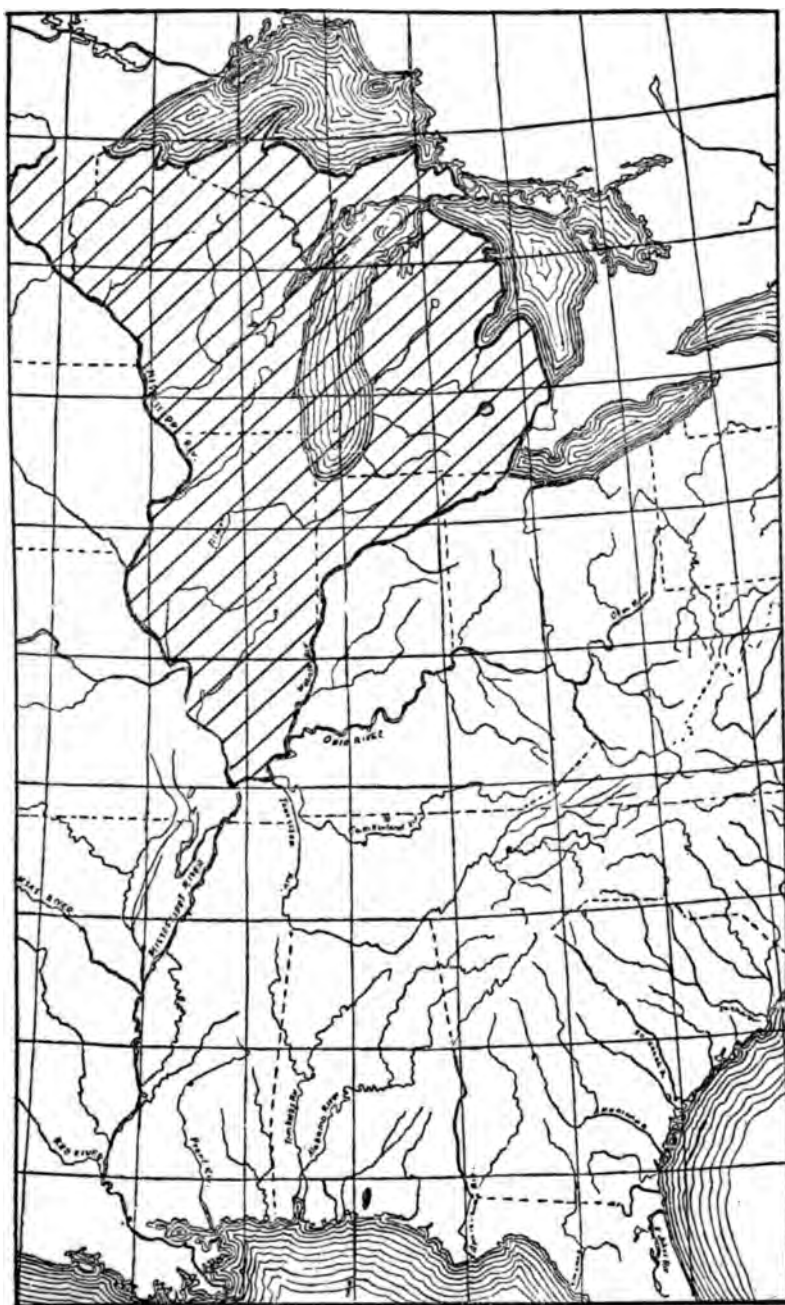
With the close of the French and Indian war, projects for new western colonies appeared faster, and now not only in America but in Great Britain as well. A pamphlet was published in London urging the "Advantages of a Settlement upon the Ohio in North America."² In the same year there appeared in Edinburgh a pamphlet recommending "That Virginia, Maryland, and Pennsylvania be terminated by a bound to be fixed thus: From Lake Erie, up the river Miamis³ to the Carrying-place, from thence down the river Waback to where it runs into the Ohio, and from thence down the Ohio to the Forks of the Mississippi."⁴ The author of the pamphlet further recommends "That the country betwixt the Mississippi and the fresh-water Lakes, extending northwest from this proposed bound, be formed into a new Colony, which might be called Charlotiana, in honour of Her Majesty, our present most excellent Queen." It was urged that this location was the most fertile and healthful in North America, and a town at or near the "Forks of the Mississippi" would become "the common Emporium of the produce and riches of that vast continent." A colony located there would give the British "the entire command of that Continent", secure the Indian trade, and defend the country and the old colonies from hostile French

¹ Draper Collection. Draper's MS. Life of Boone, III., 266, citing Maryland Gazette, January 12, and March 22, 1759. For "King David's soldiers" see I Samuel, XXII, 2.

² Draper's MS. Life of Boone, III., 266.

³ Now called the Maumee.

⁴ Expediency of Securing our American Colonies, p. 13.



CHARLOTIANA.

or Indians.¹ It was advised that the new settlers be furnished "a stock of cattle, furniture, utensils" et cetera; that they be given lands on easy tenure; that they be given also "a set of well-contrived good rules with respect to their constitution, polity, œconomy and order, wise prudent Governors, and a sufficient number of able approven Clergymen and teachers."² It was thought that a new colony might easily be peopled with disbanded soldiers and sailors, poverty stricken farmers of England and Ireland, and unfortunate debtors then "pining in jails throughout Britain and Ireland" who could be liberated by the royal mercy on condition of removal to the Mississippi valley.³ Masons, carpenters, joiners, and bricklayers would be necessary, and miners might be of good service also on account of the mines of silver, lead, and iron which were "said to be in great numbers and very rich" north of the Illinois.⁴

These are the main ideas of the scheme proposed in the Edinburgh pamphlet. It was urged that the new colony be erected at once so as to check Indian insurrections then in progress,⁵ but the scheme seems never to have been considered by the British Government.⁶

About the same time Colonel Charles Lee proposed two new colonies. He suggested that one be located on the Illinois, and the other on the Ohio below the Wabash.⁷

The King's proclamation of 1763, declaring the western lands reserved "for the present" for the use of the Indians probably checked these and other movements toward western settlement. At all events we do not find a record of many attempts to found new colonies after that date. The

¹ Ibid, p. 16.

² Ibid, p. 43.

³ Ibid, pp. 43-46.

⁴ Ibid, p. 23.

⁵ Ibid, p. 54.

⁶ Lord Hillsborough, President of the Board of Trade, declared that the Illinois scheme of 1766-67 was the first one involving a new western colony that the government considered. See his report in Franklin's Works, V., 5 et seq.

⁷ Draper, MS. Life of Boone, III., 266.

proclamation does not seem to be absolutely prohibitive however, as settlement is forbidden "without our special leave and license for that purpose first obtained."¹

¹ For the Proclamation see Houston's Const. Docs. of Canada, p. 67, or Franklin's Works, V., 75.

CHAPTER II.

THE ILLINOIS AND VANDALIA PROJECTS.

Before three years had passed by, after the King's proclamation, another scheme for new colonies appeared and was presented for his Majesty's "special leave and license."¹ The plan was drawn up by Governor William Franklin of New Jersey, with the approval of Sir William Johnson, British Superintendent of Indian Affairs.² If the scheme did not at first contemplate three new governments, it soon assumed that form. The seat of one was to be at Detroit, another in "the Illinois country" and a third "on the lower part of the River Ohio."³ There were to have been 100 original or chief proprietors in each colony, and each of these proprietors was to have been allowed to take up 20,000 acres of land (without paying any fine or consideration to the King for them), and to sell to under-tenants; and the proprietors were also to have possessed their lands fifteen years, without paying any quit-rent or taxes; . . . at the expiration of the 15 years, they were to have paid a quit-rent to the King of two shillings per

¹ In May, 1755, General Lyman with 850 associates called the "Susquehannah Company" petitioned the General Assembly of Connecticut for western lands proposing to settle under Connecticut jurisdiction (Conn. Col. Rec. X. 378.) After the French and Indian War, General Lyman appears in London trying to get a crown grant (Franklin's Works, IV., 137 et seq.). It is quite possible that his scheme at that time involved a new colonial government, but I have no evidence to prove it. For an account of General Lyman and his schemes see Am. Hist. Assoc. Report, 1893, p. 333.

² Franklin to his son, Works IV., 141; and William Franklin to his father, Works (Sparks) VII., 355.

³ Franklin's Works V., 45. In Considerations on the Agreement, with the Hon. Thos. Walpole (p. 21) notice the following: ". . . during the administration of the earl of Shelburne, several applications were made to his lordship, for grants of lands upon the River Ohio, at the Illinois, and at Detroit; and . . . his lordship, at that time proposed, the establishment of three new colonies at these places." The italics are not mine. The old pamphlet which is here and elsewhere quoted is an interesting and well written document that appeared in London in 1774. It is believed by Ford to have been written by Dr. Franklin. See his Bibliography of Franklin.

hundred acres;—and this quit-rent was to have been altogether applied to the payment of the contingencies of the government."¹ These propositions were approved by Lord Shelburne.² Further particulars in regard to details of these schemes do not appear.

The one to be erected in the Illinois country received the most attention and seemed most likely of approval by the government. The assistance of Dr. Franklin, then in London, as agent for Pennsylvania, was enlisted. In letters to his son he reported progress with the ministry. That progress cannot be better shown than by a few selections from those letters. The first one, referring to it was written May 10, 1766. He said, "I like the project of a colony in the Illinois country and will forward it to my utmost here." September 27, 1766—"I have mentioned the Illinois affair to Lord Shelburne.³ His Lordship had read your plan for establishing a colony there, recommended by Sir William Johnson, and said it appeared to him a reasonable scheme." October 11, 1766—"I was again with Lord Shelburne a few days since, and said a good deal to him on the affair of the Illinois settlement. He was pleased to say he really approved of it; but intimated that every new proposed expense for America would meet with great difficulty, the treasury being alarmed and astonished at the growing charges there, and the heavy accounts and drafts continually brought in from thence." November 8, 1766—"Mr. Jackson⁴ is now come to town. The ministry have asked his opinion and advice on your plan of a colony in the Illinois, and he has just sent me to peruse his answer in writing, in which he warmly recommends it, and enforces it by strong reasons; which gives me great pleasure, as it corroborates what I have been saying on the same topic, and

¹ Considerations on the Agreement . . . with the Hon. Thos. Walpole, p. 22.

² Ibid.

³ Lord Shelburne was at this time, and until 1768, Secretary of State for the southern department.

⁴ Richard Jackson was regularly appointed counsel to the Board of Trade in April, 1770. Chalmers, *Opinions of Eminent Lawyers*, p. 37.

from him appears less to be suspected of some American bias." June 13, 1767—"The Illinois affair goes forward but slowly. Lord Shelburne told me again last week that he highly approved of it, but others were not of his sentiments, particularly the Board of Trade." August 28, 1767—"The secretaries appeared finally to be fully convinced, and there remained no obstacle but the Board of Trade, which was to be brought over privately before the matter should be referred to them officially. In case of laying aside the superintendents, a provision was thought of for Sir William Johnson. He will be made governor of the new colony."¹ October 9, 1767—"I returned last night from Paris and just now hear that the Illinois settlement is approved of in the Cabinet Council, so far as to be referred to the Board of Trade for their opinion."

November 13, 1767—"Since my return the affair of the Illinois settlement has been renewed. The King in Council referred the proposal to the Board of Trade, who called for the opinion of the merchants on two points, namely, whether the settlement of colonies in the Illinois country and at Detroit might not contribute to promote and extend the commerce of Great Britain; and whether the regulation of Indian trade might not best be left to the several colonies that carry on such trade; both which questions they considered at a meeting where Mr. Jackson and I were present, and *answered in the affirmative unanimously*, delivering their report accordingly to the Board."

November 25, 1767, at dinner with Lord Shelburne. "Among other things. . . . we talked of the new settlements. *His Lordship told me he had himself drawn up a paper of reasons for those settlements which he had laid be-*

¹ In this same letter Franklin reports having a long conversation with Lord Shelburne and Mr. Conway, and urging the advantages of a settlement in the Illinois country in "securing the country, retaining the trade, raising a strength there which, on occasions of a future war, might easily be poured down the Mississippi upon the lower country, and into the Bay of Mexico, to be used against Cuba, the French Islands, or Mexico itself."

fore the King in Council. . . . I think he added that the Council seemed to approve of the design; I know it was referred to the Board of Trade, who, I believe, have not yet reported on it, and *I doubt will report against it.* . . . I waited next morning on Lord Clare. . . . We then talked of the new colonies. I found he was inclined to think one near the mouth of the Ohio might be of use in securing the country, but did not much approve that at Detroit. And, as to the trade, he imagined it would be of little consequence, if we had it all, but supposed our traders would sell the peltry chiefly to the French and Spaniards at new Orleans, as he heard they had hitherto done." March 13, 1768 — "The purpose of settling the new colonies seems at present to be dropt, the change of American administration not appearing favorable to it. There seems rather to be an inclination to abandon the posts in the back country, as more expensive than useful. But counsels are so continually fluctuating here that nothing can be depended on."¹

Being Franklin's private messages to his son, these letters doubtless show, as little else can, the true condition of affairs in British governmental circles of the time, so far as the question of new colonies is concerned. As for new colonies in the Illinois country "the purpose of settling" them seems never to have been revived.² The new Walpole or Vandalia company,³ as it eventually came to be called, enlisted Franklin's energies instead, and as a member of this company he made his most successful efforts to establish a British colonial government west of the Alleghany mountains. This company's attempt is much more impor-

¹ These letters may be found in Franklin's Works, IV., 136-145. The italics are mine.

² See report of Board of Trade against the scheme, made in March, 1768, in Franklin's Works, V., 5 et seq.

³ Some writers who speak of this company fail to distinguish it from the Illinois company. That they were two distinct companies may be seen by Franklin's letter to his son (Works, IV., 138), Thos. Pownall to Sir Wm. Johnson, (Washington's Writings, II., 328), and Plain Facts, p. 149.

⁴ It was also named the "Grand Ohio Company." Christopher Gist's Journal, p. 243.

tant than any scheme thus far presented, not only because of the attention which it attracted at the time,¹ but for the fact, as it will be attempted to show, that in this case the scheme finally met the approval of the British government and, in obedience to that government's order, the papers were actually drawn up for the establishment of a new colony.

After the Six Nations had ceded to the crown in 1768 a vast tract of land south of the Ohio,² a company was formed in London for the purpose of endeavoring to buy a part of it from the king.³ It was composed of gentlemen residing both in England and America. Thomas Walpole, Dr. Franklin, John Sargent, and Samuel Wharton⁴ were appointed a committee to manage the application for a land grant. In June, 1769, these gentlemen presented a petition to his Majesty for the purchase of 2,400,000 acres. The petition was referred to the Board of Trade, at the head of which, was the Earl of Hillsborough. Mr Walpole and his associates waited upon the Board of Trade in December, 1769, "when the Earl of Hillsborough recommended to them to contract if possible with the lords of the Treasury for such part of the purchase from the Six Nations, lying

¹ See the newspapers of 1772 and 1773.

² The treaty of Fort Stanwix, Nov. 5, 1768. The Indians ceded everything south of a line "beginning at the Mouth of the Cherokee or Hogohege [Tennessee] river, where it emptys into the River Ohio, and running from thence upwards along the South side of said River to Kittaning, which is above Fort Pitt; from thence by a direct Line to the nearest Fork of the west branch of Susquehanna, thence through the Alleghany Mountains . . ." Deed of cession, Docs. Rel. to Col. Hist. of the State of N. Y., VIII., 136.

³ Plain Facts, p. 149. The pamphlet here cited appeared anonymously in Philadelphia in 1781. Its authorship is ascribed by Sabin (see his dictionary) to Dr. Franklin or A. Benezet. Much the same ground is covered without conflict in "Considerations upon the Agreement," and in Franklin's Reply to Hillsborough and Memorial to Congress, from which we may judge the reliability as to facts of all of them, even if Franklin were not the author of the anonymous pamphlets as is supposed. Compare the proposals of Hoops and Buchanan, Feb. 22, 1769, in 4 Massachusetts Historical Collections, X., 608.

⁴ Lord Camden, Thos. Pitt, Thos. Pownall, Sir William Johnson, and Colonel Croghan were some of the other members of the Company. Plain Facts, p. 159; Considerations upon the Agreement, et cetera, p. 3, and letter of Thos. Pownall to Sir Wm. Johnson, April 1770, Washington's Writings, II., 328.

on the river Ohio, as would be sufficient in extent to form a separate government upon,"¹ "promising them, in case of their agreement, a *good charter* for such government."²

"The Earl of Hillsborough offered to go immediately to the treasury and know their lordships opinion upon the subject, and the petitioners expressing their approbation, his lordship went, and reported that the lords of the treasury would be glad to receive the gentlemen's proposals."³ This is the first definite suggestion of the idea of a new colonial government in connection with this scheme, and it is noticeable that the suggestion came in a very practical way, and from a man so prominent in the British government as the President of the Board of Trade. It is remarkable also in view of Lord Hillsborough's subsequent opposition to the new government which he himself suggested.⁴ That Franklin, and perhaps his associates, had hoped to bring about in some way the establishment of a new government in connection with their scheme seems indeed very probable in the light of his previous interest in the question. However, the first petition of the Walpole company, as it was called, was for a comparatively small grant of land only, with apparently no thought of any new colonial government.⁵ The larger tract of land suggested by Lord Hills-

¹ Plain Facts, p. 149.

² Considerations on the Agreement . . . with the Hon. Thomas Walpole, p. 2. The italics are not mine.

³ Plain Facts, p. 149.

⁴ Later Franklin wrote to his son concerning Lord Hillsborough as follows: "Witness, besides his various behaviour to me, his duplicity in encouraging us to ask for more land, *ask for enough to make a province* (when we at first asked only for 2,500,000 acres), were his words, pretending to befriend our application, then doing everything to defeat it; and reconciling the first to the last, by saying to a friend that he meant to defeat it from the beginning; and that his putting us upon asking so much was with that very view, supposing it too much to be granted." Franklin to his son, July 14, 1773—Works, V., 196.

⁵ Professor Hinsdale (Ohio Arch. and Hist. Quarterly, I., 218 and Old Northwest, p. 133) says that the proposition in 1769, was to establish a new colony and the petition was made for 2,400,000 acres "on which to found a new government." This is palpably an error. J. L. Peyton (Hist. of Augusta Co., Va., p. 144, et seq.) confuses the whole history of the Vandalla attempt with that of the Illinois scheme. Lord Fitzmaurice does the same, for he says that Shelburne "did his best to encourage the settlement on the Illinois known as Walpole's grant." Life of Shelburne, II., 31.

borough was soon agreed upon with the lords of the Treasury, the price being £10,460: 7s: 3d., the amount paid the Six Nations for their cession.¹

On the 8th of May, 1770, a petition for "a grant for the lands"² was presented to the King in council, by whom it was referred to the Board of Trade. July 15 following, Lord Hillsborough announced "that as there were, perhaps, some settlers from Virginia seated on part of the tract under consideration, he was of opinion that that colony should be acquainted with the contract made with the treasury; and therefore the report of the Lords of Trade would be delayed only until it was known whether Virginia had anything to say upon the subject."³ The governor of Virginia, however, explained Lord Hillsborough, would be especially ordered to allow no surveys or settlements to be made "on any of the lands which the company had contracted for."

Governor Botetourt just having died,⁴ Mr. Nelson, president of the Virginia council, replied officially October 18, 1770, to Lord Hillsborough's letter. He duly acknowledged the propriety and justice of "delaying to report in favour of Mr. Walpole and his associates for a grant of lands on the back of Virginia until the country should be made acquainted with it, and their reasons, if they had any, in objection should be heard."⁵ Mr. Nelson hoped that the grants to the old Ohio company, to the officers of the late war, and to Colonel Croghan and the traders⁶ would be re-

¹ Franklin's Works, V., 82.

² In April, 1770, Thomas Pownall wrote to Sir Wm. Johnson that a bargain with the treasury had been concluded for a large tract of land on the Ohio and that next an application would be made for a charter of government. *Life and Writings of Washington* (Sparks), II., 448. It would seem from this letter, as well as the subsequent history, that the petition was for a new government as well as for "a grant for the lands."

³ Plain Facts, p. 150.

⁴ Ibid., p. 159.

⁵ Ibid., p. 152.

⁶ Mr. Nelson estimated that these grants amounted altogether to about 1,700,000 acres. The author of *Considerations on the Agreement* estimated (p. 33) that with this deduction the Walpole company would have left "twelve millions of acres of cultivable lands." The traders' grant was provided for in the treaty of Fort Stanwix to compensate them for losses sustained in the French and Indian War. See Christopher Gist's *Journal*, p. 241; Plain Facts, p. 94.

spected, but he appears to have made no further objection. He said — " We do not presume to say to whom our gracious Sovereign shall grant his vacant lands; nor do I set myself up as an opponent to Mr. Walpole and his associates, . . . With respect to the establishment of a new colony on the back of Virginia, it is a subject of too great political importance, for me to presume to give an opinion upon. However permit me, my Lord, to observe, that when that part of the country shall become sufficiently populated, it may be a wise and prudent measure." ¹

After nearly two years' delay the report of the Board of Trade appeared. It was a long argument against making the grant to Walpole and company, and called out a powerful and convincing reply from Dr. Franklin.² To the objection that the tract of land asked for "appears . . . to contain part of the dominion of Virginia . . . and to extend several degrees of longitude westward from the western ridge of the Appalachian Mountains,"³ he replied that "no part of the above tract is to the eastward of the Alleghany Mountains, and that those mountains must be considered the true western boundary of Virginia."⁴

Lord Hillsborough argued that part of the tract lay beyond the boundary line between his Majesty's territories and the Indian hunting grounds as established by treaties.⁵ To this Franklin made a long argument to show that the treaty of Fort Stanwix vested in the crown the complete

¹ Plain Facts, p. 153, quoting Nelson's letter. Also Thos. Paine's Public Good, p. 24.

² Both documents may be found in Franklin's Works, V., 1-75. The President of the Board of Trade was Lord Hillsborough, who was also Secretary of State for the Colonies, an office created in 1768. The ministry rejecting his report, he "quit his American Seals, because he will not reconcile himself to a plan of settlement on the Ohio which all the world approves." Horace Walpole to Sir Horace Mann, July 23, 1772. Letters of Horace Walpole (Cunningham), V., 401. "Dr. Franklin's answer to the report of the Board of Trade was intended to have been published; but, Lord Hillsborough resigning, Dr. Franklin stopped the sale on the morning of the publication when not above five copies had been disposed of". Franklin's Works, X., 2.

³ Franklin's Works, V., 3.

⁴ Ibid., p. 20.

⁵ Ibid., p. 3. Compare the treaty of Ft. Stanwix and the treaty of Lochaber, 1770. Cf. Massachusetts Historical Collections, X., 725.

title to all the lands asked for, and adds that if there has been any agreement with the Indians not to allow settlement on a part of them (which Franklin plainly doubts), that can be easily arranged for "by a specific clause being inserted into the King's grant to us, expressly prohibiting us from settling any part of the same, until such time as we shall have first obtained his Majesty's allowance and full consent of the Cherokees, and the Six Nations and their confederates for that purpose."¹ In the third place it is urged against the scheme that it is contrary to the principles adopted by the Board "immediately after the treaty of Paris, viz., the confining the western extent of settlements to such a distance from the sea-coast as that those settlements should lie within the reach of the trade and commerce of this kingdom," not only for commercial purposes but also to preserve "the colonies in due subordination to, and dependence upon, the mother country."² Against this, Franklin makes an argument to show that "the settlement of the country over the Alleghany Mountains and on the Ohio was not understood, either before the treaty of Paris, nor intended to be so considered by his Majesty's proclamation of October, 1763, 'as without the reach of the trade and commerce of this kingdom.'"³

To the argument that various propositions for erecting colonies in the same part of the country have already been rejected, and the same reasons for rejection exist in this case, Franklin replies that, consistent with his knowledge, "no more than one proposition for the settlement of any of the land in question has been presented to government, and that was from Dr. Lee" and thirty-four associates who "did not propose, as we do, either to purchase the lands, or pay the quit-rents to his Majesty, neat and clear of all

¹ Franklin's Works, V., 31.

² Lord Hillsborough adds here, "and these we apprehend to have been two capital objects of his Majesty's proclamation of the 7th of October, 1763"—Ibid., p. 4.

³ Ibid., p. 32.

deductions, or be at the whole expense of establishing and maintaining the civil government of the country."¹

Hillsborough declared that "the great object of colonizing upon the continent of North America has been to improve and extend the commerce, navigation, and manufactures of this kingdom.

"(1) By promoting the advantageous fishery carried on upon the northern coast.

"(2) By encouraging the growth and culture of naval stores and of raw materials, to be transported hither in exchange for perfect manufactures and other merchandise.

"(3) By securing a supply of lumber, provisions, and other necessities, for the support of our establishments in the American islands."²

Admitting this, Franklin asserts that the proposed "Ohio colony" will promote the fishery as much as any of the colonies south of New York, and "on the second and third general reasons . . . no part of his Majesty's dominions in North America will require less encouragement. Expanding this point, he declares that "the lands in question are excellent, the climate temperate; the native grapes, silk worms, and mulberry trees are everywhere; hemp grows spontaneously in the valleys and low lands; iron ore is plenty in the hills, and no soil is better adapted for the culture of tobacco, flax, and cotton than that of the Ohio." As to the ability of colonists to export these products, he says that on account of the navigable rivers produce can, by a land carriage of only forty miles, be sent cheaper from the Ohio country to Alexandria on the Potomac "than any kind of merchandise is at this time sent from Northampton to London;" moreover "large ships may be built on the Ohio, and sent laden with hemp, iron, flax, silk, to this kingdom."³ Franklin concludes by declaring that there are already thirty thousand British subjects settled on the

¹ Franklin's Works, V., 44, 45.

² Ibid., p. 5.

³ Ibid., pp, 47, 48.

Ohio lands, and asks if it is "fit to leave such a body of people lawless and ungoverned." With the capitol of Virginia at least four hundred miles distant how could the constitution and laws of that colony "be extended so as effectually to operate on the territory in question?" By Virginia laws all persons charged with capital crimes must be tried in Williamsburg. There is held the superior court and the General Assembly.¹

Franklin's reply to the report of the Board of Trade was read to the council at the same time that Mr. Wharton made his argument. The council was fully convinced² and the Committee of Council for Plantation Affairs, on July 1st, 1772, reported to the King:—

"(1) That the lands in question had been for some time past and were then in an actual state of settling, numbers of families to a very considerable amount removing thither from his said Majesty's other colonies.

"(2) That the lands in question did not lie beyond all advantageous intercourse with the kingdom of Great Britain,"³ and "that it was their opinion a grant should be made to Mr. Walpole and his associates,"⁴ and "to the end that the several persons actually settled, or that might thereafter settle, might be more properly and quietly governed, the said settlement and district should be erected into a separate government."⁵

¹ Franklin's Works, V., 73, 74.

² Rev. William Hanna was present when the case of the company was presented to the council. He wrote to Sir William Johnson that after Mr. Walpole had made some pertinent observations, "Mr. Wharton spoke next for several hours and replied distinctly to each particular objection, and through the whole of the proceedings he so fully removed all Lord Hillsborough's objections and introduced his proofs with so much regularity and made his observations on them with so much propriety, deliberation, and presence of mind, that fully convinced every Lord present." Christopher Gist's Journal, p. 242.

³ Franklin's Works, X., 355.

⁴ Plain Facts, p. 153.

⁵ Franklin's Works, X., 357. The Pennsylvania Chronicle, Nov. 14, 1772, published an article entitled "Reasons for Lord Hillsborough's Resignation," signed "An Advocate of Lord Hillsborough." The writer said that Mr. Walpole and others had petitioned for a grant "adjoining to the Mississippi, with intention to establish a new colo-

On the 14th of August, 1772, *the King approved of this report*¹ "and ordered the Lords of Trade to report to him in Council, if any, and what terms of settlement and cultivation; and what restrictions and reservations were necessary to be inserted in the grant. . . . with a clause to save and preserve to the respective occupiers all prior claims within its limits. . . .; and also to prepare a plan for establishing a new government on the said lands, together with an estimate of the expense, and the ways and means by which the same should be defrayed by Mr. Walpole and his associates. The same day, the King in council, by a further order, gave the necessary directions to the Lords Commissioners for trade and plantations, for carrying the above into execution; and that the Earl of Dartmouth² should direct his Majesty's Superintendent for Indian affairs to apprise the chiefs of the Six Nations and their Confederates of his Majesty's intentions to form a settlement upon the lands which he purchased of of them in 1768. Accordingly the Earl of Dartmouth sent instructions to Sir William Johnson. . . . and in obedience thereto, the Six Nations were informed and much approved of the Settlement."³

The chiefs of the western tribes were assembled April 8d, 1773, at Scioto, and the same communication made to them. They appeared highly pleased and expressed a desire to take the new colonial governor, who ever he might

ny," and that Lord Hillsborough's "political reasons" against it were that Great Britain "depopulates very fast . . . and as to the utility of a new colony, granting that we could spare our people, no more advantage would accrue to Great Britain from this Mississippi establishment than if it was to take place in the confines of India." The Walpole grant is here perhaps confused with Gen. Lyman's Mississippi grant made about the same time. See Pennsylvania Gazette and Pennsylvania Chronicle, Feb. 24, 1773.

¹Besides Plain Facts on this point, see also letter of Mr. Wharton to Col. Mercer, Aug. 20, 1772. Washington's Writings (Sparks) II., 485. Mr. Wharton says that the King ordered "That a new government should be established."

²Lord Dartmouth had succeeded to Hillsborough's position.

³Plain Facts, p. 153. The same facts in different language may be found in Franklin's Works, X., 357-360.

be, "by the hand and afford him all the assistance in their power."¹

Meanwhile not the Indians alone, but the American people were hearing about the new colony. In June, 1772, Washington wrote: "The report gains ground that a large tract of country on the Ohio, including every foot of land to the westward of the Alleghany Mountains is granted to a company of gentlemen in England, to be formed into a separate government."² The following year the American newspapers published a good deal about the new colony and its progress.³ Many particulars appeared in the *Pennsylvania Chronicle* of March 8 and the *Pennsylvania Gazette* of March 10 about the grant which "is to be granted to Thomas Walpole" and company, the latter paper publishing a statement that on account of obstacles which the scheme had met, it would, according to some letters, be brought before Parliament.

But there was no necessity for bringing the matter into Parliament. May 6, 1773, Lord Dartmouth (Hillsborough's successor) reported for the Board of Trade, which had been ordered to arrange particulars in regard to the land grant and colonial government. He said that, the establishment of the new colony was, they supposed, founded principally "on the necessity there was of introducing some regular form of government in a country incapable of participating the advantages arising from the civil institution of Virginia," and therefore they had given their attention first to "the form and constitution of the new colony which they named Vandalia."⁴ We are unable to deter-

¹ Plain Facts, p. 154. For the entire speech returned by the western chiefs on that occasion see Considerations on the Agreement. . . with the Hon. Thos. Walpole, pp. 9, 10, 11.

² Washington to Lord Dunmore, Lieut. Gov. of Va., June 13, 1772. Washington's Writings (Ford), II., 353.

³ See *Pennsylvania Chronicle*, Feb. 24, March 8, June 7, Sept. 20; *Pennsylvania Gazette* Feb. 24, March 10, June 9, Sept. 8; *Pennsylvania Journal*, June 9, July 21, Nov. 24, 1773.

⁴ Plain Facts, p. 154. If the statements in the following letter were correct in regard to the name of the new colony, we should be tempted to use it for other interesting items.

mine many of the particulars concerning the form of government determined upon in this constitution. Three years before, Thomas Pownall, a member of the Company and brother of the secretary of the Board of Trade, had proposed to take the Massachusetts Bay charter for a model,¹ and it seems likely that that plan was followed. The governor and other officers of the colony were to be appointed by, and hold "their several commissions during the pleasure of the King."² These officers, moreover, were to be quite independent of everyone except the King in regard to their salaries. They were to be paid by the Company, to be sure, but the Company was compelled to give bonds for £10,000 to secure them,³ and later actually did give such security for the payment of £3,000 annually for officers' salaries.⁴ Beginning with the date of the governor's commission, the Company was to have paid that amount regularly in half yearly payments for the support of the governmental establishment.⁵ Walpole and his associates were to have been held responsible for such payment "until provision should have been made by some act of General Assembly, *to be approved of by his said Majesty*, for the support of the said establishment."⁶ The salaries of the new colonial officers were fixed by Lord Dartmouth's report as follows:

It is from "Mr. John Ballendine to his friend in Virginia," dated London, March 23, 1773. He says: "I can inform you for certain that the new province on the Ohio is confirmed to the proprietors by the name of Pittsylvania, in honor of Lord Chatham. Mr. Wharton, from Philadelphia, will be appointed governor in a few days; all other appointments to be made by the King. The seat of government is to be fixed at the fork of the Great Kanawa and Ohio rivers, as I expected from the situation of the country." Pa. Journal, June 9, 1773. The Pennsylvania Gazette, Sept. 8, 1773, published a rumor that Col. George Mercer, who had been agent for the old Ohio Company, was "to be governor of the new colony on the Ohio, which should be called Pittsylvania."

¹ Thos. Pownall to Sir William Johnson, April, 1770. Writings of Washington (Sparks), II., 448.

² Considerations on the Agreement, et cetera, p. 36.

³ Franklin's Works, X., 362.

⁴ Considerations on the Agreement, et cetera, p. 36, citing Register "in the provincial rolls office."

⁵ Franklin's Works, X., 362.

⁶ Loc. cit. The italics are mine.

Governor.....	£1,000
Chief Justice.....	500
Assistant Judges.....	400
Attorney General.....	150
Clerk of the Assembly.....	50
Secretary.....	200
Two Ministers.....	200
	£2,500

Besides this the Company was responsible for the payment of the contingent expenses to an amount not to exceed £500.¹

In view of these facts concerning the form of government, and the farther fact (to be shown presently) that the *colony* was to have embraced a considerably larger territory than the grant to the Company, it can hardly be asserted that a proprietary colony, in the ordinary meaning of that term, was contemplated. Indeed, none of the thirteen colonies were more dependent on the crown than it was intended that Vandalia should be. Speculation was, of course, indulged in as to who was to receive appointments to the new colonial offices,² and there is little doubt that George Mercer, former agent for the Ohio Company, expected to be appointed governor.³

But to return to Lord Dartmouth's report. It goes on to recommend "that the grantees should, upon the day of the date of the grant, pay into the receipt of his said Majesty's exchequer, the sum of £10,460:7s:3d., pursuant to the agreement made with his Majesty's treasury on the 4th of January, 1770," and that all prior claims upon the lands "should be saved and reserved to the respective occupiers and possessors." ⁴

¹ Franklin's Works, X., 382.

² See, for example, note on p. 29.

³ See his letter to William Fairfax, Dec. 2, 1773. Rowland's George Mason, I., 157.

⁴ This would secure the titles of the so-called Indiana Co. (Traders grant), George Washington (see his advertisement in Pa. Chronicle of June 28, 1773) and other officers of the French and Indian War. As for the Ohio Company the facts seem to be as follows: When the Walpole company petitioned for a large grant early in 1770, it was found that not only was Arthur Lee's petition of 1768 for 2,500,000 acres of the same land being pressed in

In regard to the boundaries, the land grant to the company was to be bounded by the following lines: "Beginning at the south side of the river Ohio, opposite to the mouth of Scioto; then southerly through the pass of the Ouassito¹ Mountains, to the south side of the said mountains; then along the side of the said mountains northeasterly to the fork of the Great Kenhawa, made by the junction of Green Briar River and New River; thence along the said Green Briar River, on the easterly side of the same, unto the head or termination of the northeasterly branch thereof;

opposition, but also the Ohio Company, represented by Colonel George Mercer, was suing for a completion of their grant which also conflicted. (Franklin's Works, X., 350). The latter was bought off by the following written agreement, made May 7, 1770. "We, the Committee of the Purchasers of a Tract of Country for a new Province on the Ohio in America, do hereby admit the Ohio Company as a Company purchaser with us, for two Shares of the said Purchase in Consideration of the engagement of their Agent, Col. Mercer, to withdraw the application of the said Company for a separate Grant within the Limits of the said Purchase. Witness our Hands," et cetera.—Christopher Gist's Journal, p. 244. "This action of Mercer without authority was not approved by the Ohio Company, and while the subject was still in agitation the Revolutionary War came on and put an end to the existence of both Companies."—Dinwiddie Papers, I., 18. This is not strictly true, as will be shown. See George Mason's account of the Ohio Company's action in Rowland's George Mason, I., 414.

Arthur Lee and his associates failed to receive a grant. Besides Arthur Lee and two Londoners, his company comprised "thirty-three gentlemen of character and fortune in Virginia and Maryland, (several of whom were of his Majesty's council in Virginia, and many of them, members of the house of assembly, both of that colony and of the province of Maryland)." They gave themselves the name of "Mississippi Company" and proposed to increase their number to fifty. Considerations on the Agreement, et cetera, pp. 25, 26. This appears to have been a scheme distinct from that embodied in "a petition, that was presented to government in 1772, by many respectable persons, requesting the establishment of a new colony, at an expense to the crown, upon the river Mississippi." Dinwiddie Papers, I., 38. I find nothing further to show that this petition proposed a new government. Arthur Lee seems to have continued in a position of opposition to the Walpole Company. In August, 1782, he opposed in congress the doctrine that the sovereignty over the western lands devolved upon congress, urging that if congress should take that position, the claim of Franklin and others "to some of the lands in question" "will be strengthened." Rather than allow this, he thought that our ministers plenipotentiary in Paris, one of whom was Franklin himself, ought not to be allowed to claim the West in the pending peace negotiations on any other ground than the rights of the separate states. See The Thomson Papers, N. Y. Hist. Soc. Colls, 1878, p. 143; Wellington's The States' Rights Conflict Over the Public Lands, Am. Hist. Assn. Papers, III. No. 2, p. 174.

¹ An old name for the Cumberland. See "A New Map of the Western Parts of Virginia, Pennsylvania, Maryland, and North Carolina" by Thos. Hutchins, London, November 1, 1778; also a map published by Laurie and Whittle, No. 53, London, 12th May, 1794. The pass referred to is evidently Cumberland Gap.

thence easterly to the Alleghany Mountains; thence along the said Alleghany Mountains to Lord Fairfax's line;¹ thence along the same to the spring head of the north branch of the river Potomack; thence along the western boundary line of the province of Maryland to the southern boundary line of the province of Pennsylvania; thence along the said boundary line of the Province of Pennsylvania to the end thereof; thence along the western boundary line of the said province of Pennsylvania until the same shall strike the river Ohio; thence down the said river Ohio to the place of beginning."² These are the limits of the land grant, but no restrictions were made upon settling beyond a certain Cherokee treaty line,³ and in fact the western limits of the Colony of Vandalia were extended beyond the line of the grant to the Louisa or Catawba, or Cuttawa river,"⁴ which is now called the Kentucky river.⁵

There was one other item of the report which is of interest as showing the design to establish the Episcopal church in the new colony. It provided that in each parish "there should be a tract of three hundred acres reserved for the purpose of a glebe for the support of a minister of the church of England."⁶

Such, then, are the main points of Lord Dartmouth's report, drawn up by the Lord's Commissioners for trade and

¹ Lord Fairfax's boundary line ran from the S. W. corner of Maryland, S. E. by S. to the headwaters of "Conway R." or "Rapid Ann." See Thos. Hutchins' Map, London, Nov. 1, 1778.

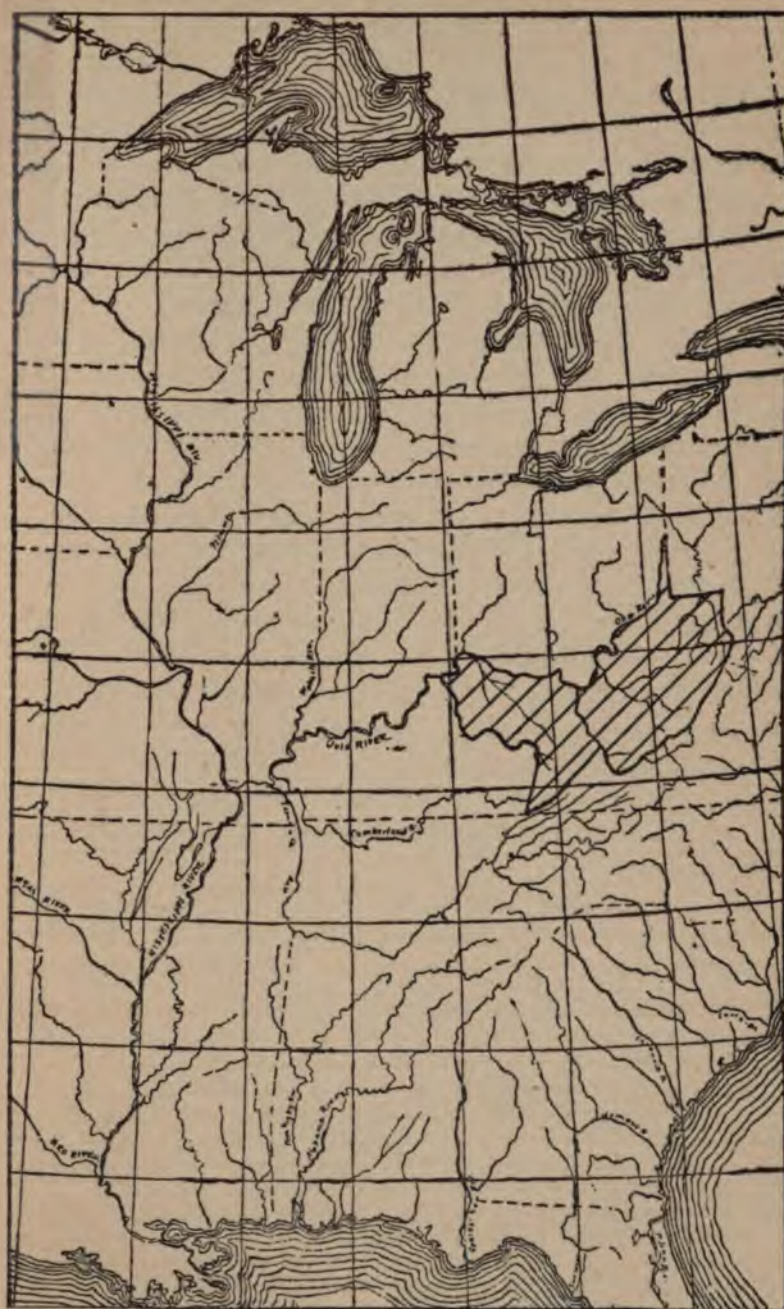
² The language of Lord Dartmouth's report. Franklin's Works, X., 363, and Plain Facts, p. 155.

³ Established at the treaty of Lochaber, Oct. 1770. Franklin's Works, X., 366.

⁴ Plain Facts, p. 156. Christopher Gist (Journal, p. 243) says that the new colony "contained within its limits all the Walpole Grant, with the addition of all the country westward to the Kentucky River." Professor Turner's map of Vandalia in the American Historical Review, Oct., 1895, represents, not the proposed colony of Vandalia, but merely the proposed land grant to Walpole and company.

⁵ Compare the following maps: "The U. S. of N. Am. etc." by Wm. Faden, 1783; Map of Richardson and Urquhart, Lond., Apr. 28, 1780; "Carte de l'Amerique Septentrionale etc." 1780; and Hutchins' Map, Lond., Nov. 1, 1778, on which the river in question is called "Kentucke or Cuttawa River."

⁶ Franklin's Works, X., 364.



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plantations in obedience to his Majesty's order of August 14, 1772, and presented May 6, 1773. May 19th, the King referred it to the lords of the Council. After a minor change had been made, by the attorney and Solicitor-General, concerning the manner of paying the quit rents, a decisive order was issued from the council chamber, October 28, 1773, directing the King's attorney and Solicitor-General to "prepare and lay before this Committee" of the Council "the draught of a proper instrument, to be passed under the Great Seal of Great Britain, containing a grant to the Honorable Thomas Walpole, Samuel Wharton, Benjamin Franklin," et cetera, "of the lands prayed for by their memorial, . . . inserting in the said draught the conditions and reservations proposed in the said report of the Lords Commissioners for trade and plantations, dated the 6th of May, 1773."¹ So the matter seemed to be settled.² When the governor of Virginia presumed to grant lands in the Vandalia territory, he was sharply reprimanded by Lord Dartmouth, then Secretary of State for the Colonies,³ and the following spring was careful that no Virginia surveyors should enter any part of the territory "Petitioned for by Walpole and Company (commonly called the new Government)."⁴

But still the final papers, establishing the Walpole grant and the colony of Vandalia had not been executed; delayed, probably, by the threatening attitude of the old colonies. In the spring of 1775, the draught of the royal grant had been prepared, and even examined and corrected by mem-

¹ This order may be found in Plain Facts, p. 157, and Franklin's Works, X., 387.

² It had been rumored before this, that the new colony was about to be established. The Pa. Journal, November 24, 1773, published part of a letter from London, dated September 7, saying of the new colony, "in all probability the next packet will carry to America proper documents for its establishment." The Pa. Chronicle of September 20, published a letter assuring that "the draft for the charter for establishing a new colony on the Ohio . . . was in a few days to be carried up by Mr. Thurloe for the last revision of his Majesty in Council, previous to a final delivery of it to the Proprietors." Newspaper copies in Draper Collection, Clark MSS., Vol. 13, No. 1, p. 172.

³ Plain Facts, p. 159; Franklin's Works, X., 389.

⁴ Draper Colls., Preston Papers, IV., No. 6.

bers of the Company, when the execution of it was suspended.¹ "The Lord President of his Majesty's Privy Council requested that the Honorable Mr. Walpole and his associates would wait for the grant aforesaid, and the plan of government of Vandalia, until hostilities, which had then commenced between Great Britain and the United Colonies, should cease."² But those hostilities did not cease until the thirteen colonies had won. If the war had broken out a little later there seems every reason to suppose that there would have been fourteen instead of thirteen colonies to fight for independence. As it was, however, the colony of Vandalia failed of establishment. The company lived on for a number of years, vainly petitioning Congress to confirm its claims.³

With the Declaration of Independence, Virginia had asserted claims to the back lands in accordance with the provisions of her old charter. She was much annoyed when Congress "received and countenanced petitions from certain persons styling themselves the Vandalia and Indiana Companies."⁴ Congress seems never to have taken definitive action on the Vandalia claims, and in a few years nothing more is heard of the company which, in its day, bid fair to become the pioneer in the political organization of the west.

¹ Plain Facts, p. 159.

² Franklin's Works, X, 370. Thos. Walpole wrote to Wm. Trent, May 30, 1775, "We must flatter ourselves that the little which is wanting here will soon be done." He also said, "I hope that you will find everything in Vandalia in as good a way as you could expect; if not you will be able to take such measures as may secure the property which we have got there, and especially that you will be able to protect it from farther violations." Historical Magazine, 1837, Vol. I., p. 85. Whether this property was anything more than the land, which was merely contracted for, it is impossible to say. It may have been property formerly owned by the Ohio Company.

³ Plain Facts, p. 160; Journals of Congress, Sept. 14, 1779. It was occasionally referred to in connection with the Indiana, Illinois, and Wabash companies,—e. g. in Pennsylvania Packet, Jan. 5, 1786, quoting from a letter dated Dec. 10, 1781 from a Virginia delegate in Congress.

⁴ See the Remonstrance in Hening X., 537.

CHAPTER III.

CONCLUSIONS FROM THE FOREGOING CHAPTERS.

In the two preceding chapters it has been the endeavor to give a connected history of the various attempts to establish colonial governments west of the Alleghany mountains. This history makes possible a few generalizations here, by way of summary.

In the first place, it is worthy of note that practically every proposition for a new colony involves its location on the Ohio. Not only did the Ohio river flow through a most fertile country, but it was in itself the gateway to the west. It was natural that would-be western colonists should turn their attention first in that direction.

In the next place, it is noticeable that the supporters of these schemes are, for the most part men from Pennsylvania, or New Jersey. This is probably due to the following facts. Pennsylvania was one of the most populous colonies, the nearest to the Ohio, and was by her charter limited on the west. The inhabitants of most of the colonies could find desirable lands without going outside of what they considered their legal limits. The Hazard scheme was evidently Presbyterian in its conception and its support, and so Hazard would naturally get a large following from Presbyterian New Jersey.¹

Dr. Franklin's unwavering interest in new colonies doubtless had some effect on Pennsylvanians, and without doubt strongly influenced his son, Governor William Franklin of New Jersey; where also Thomas Pownall was Lieutenant Governor at the time of the Albany Congress. To these facts should be added the information and interests

¹ Hazard argued that only Presbyterians can, and are willing to colonize. 4 Am. Archives, I., 863.

of the Pennsylvania Indian traders, such as the firm of Baynton, Wharton and Morgan.

Again, it may seem strange, that when all these schemes for new colonies were being brought forward, there was no protest from Virginia, that her jurisdiction was being threatened. Every scheme proposed, involved an invasion of territory, which, after the Revolution, she so strenuously insisted on as within her charter limits. In November, 1770, the Earl of Dunmore wrote to Lord Hillsborough that he had made it his "business to inquire and find out the opinion of the people" on the question of "establishing a colony on the Ohio."¹ His letter would indicate that he found only disapproval; but among all the objections advanced, not one had reference to the invasion of the jurisdiction of any old colony. We might surely have expected that Lord Hillsborough's letter to the Virginia governor, inviting objections to the establishment of Vandalia, back of Virginia, would have called out an objection on the score of invaded jurisdiction. But instead, the official reply states that "with respect to the establishment of a new colony on the back of Virginia, . . . when that part of the country shall become sufficiently populated it may be a wise and prudent measure,"² the only care being that land titles under prior grants should be respected by the new colony. Also in the opposition arguments before the council at Whitehall, while the question was brought up as to the expediency of the western country, or part of it, being under Virginia's jurisdiction, the charter right of Virginia was, so far as we know, never mentioned as an objection to the establishment of Vandalia. There can be little doubt

¹ Documents Relative to the Colonial History of N. Y., VIII., 253. Also Fernow's Ohio Valley in Colonial Days, p. 276. George Washington declared in November, 1773, that Virginia had a right to the lands beyond "the western boundary of the new colony" both by charter and by sale of the Six Nations, thus virtually conceding the better right of the Vandalia Company to the lands that had been as yet merely bargained for. Washington to Gov. Dunmore, Writings (Ford) II., 396. Washington evidently thought the King's Proclamation of 1763 did not interfere with Virginia's territorial extent.

² Pres. Nelson to Lord Hillsborough, Oct. 18, 1770. Public Good, p. 24.

that it was generally recognized that the crown had the right to cut off vacant lands from any colony at pleasure, regardless of that colony's chartered extent. It was urged that one object (quite a secondary one however) of the King's proclamation of 1763, was to limit the colonies on the west, as "the charters of many of our old colonies give them, with few exceptions, no bounds to the westward but the South Sea."¹ If so, the King was merely using his recognized right. In the previous century there had been several cases in which new colonies had been carved out of the chartered territory of older ones, and there is no reason to believe that the crown did not still possess the right. In this connection, it may be well to mention that the fact of the province of Quebec, being extended to the Ohio and Mississippi rivers by the Quebec Act of 1774² was no guarantee whatever against new colonies being erected north of the Ohio, whenever the British government should choose to establish them.³

But the most difficult subject upon which to draw conclusions from the foregoing attempts at colonization, is the policy of the British government in regard to new western colonies. In order to understand the situation, it is necessary to know something of the way American affairs were conducted in London. Until 1766 their direction appears to have been jointly in the hands of the Secretary of State for the Southern Department, and the President of the Lords Commissioners for Trade and Plantations,⁴ the other members of the Board cutting little or no figure. The President of the Board of Trade doubtless attended to most of the details of colonial administration, but as the

¹ Annual Register, 1763, p. 20. The Annual Register is supposed to have been written by Edmund Burke.

² Houston's Const. Docs. of Canada, p. 91.

³ It is Hinsdale's opinion that one object of the Quebec Act was "permanently to sever the West from the shore colonies, and put it in train for being cut up when the time should come, into independent governments that should have their affiliations with the St. Lawrence basin rather than with the Atlantic slope." Old Northwest, p. 141.

⁴ Commonly called the Board of Trade.

colonies were also within the Secretary's department, the latter often exercised a marked influence in colonial affairs. Important questions, however, were referred through the King to the Council, with whom rested practically the final decision.

In 1766 a change was introduced. The Board of Trade was made "a mere Board of Report upon reference to it for advice or information on the part of the Secretary of State," and "Shelburne, who held the seals of the Southern department, was directed to carry it out in conjunction with Hillsborough, the President of the Board."¹ Another change was made January 20, 1768, when Lord Hillsborough became Secretary of State for the Colonies, the creation of this new office being found necessary on account of the growing importance of colonial affairs.² This made Hillsborough both President of the Board of Trade, and Secretary of State for the Colonies, with the whole direction of colonial affairs, subject to the King and Council. This was the situation when Thomas Walpole and Company began action for the Vandalia scheme, and remained the situation until the summer of 1772, when Horace Walpole could write as follows: "Not a cloud in the political sky except a caprice of Lord Hillsborough, who is to quit his American Seals because he will not reconcile himself to a plan of settlement on the Ohio which all the world approves."³ He did resign, and was succeeded by Lord Dartmouth, who was, or at least had been regarded as, friendly to "settlement on the Ohio."⁴

Lord Hillsborough, however, before his resignation, took such a prominent part in the question of new colonies, that his real personal influence needs to be considered. The slurring language of Horace Walpole is not the only indi-

¹ Fitzmaurice, *Life of Shelburne*, II., 2. See this work for description of the system.

² *Dictionary of National Biography*, XXVI., 428.

³ Horace Walpole to Sir Horace Mann, July 23, 1772. *Letters of Horace Walpole* (Cunningham), V., 401.

⁴ Franklin to his son, Sept. 12, 1766. *Works*, IV., 137.

cation that he was not held personally in high regard. Franklin wrote of him to his son that he, "of all the men I ever met with, is surely the most unequal in his treatment of people, the most insincere and the most wrong-headed,"¹ and Franklin was not the man unfairly to disparage another over whom he had won a signal triumph. King George III. said "I am sorry to say, I do not know a man of less judgment than Lord Hillsborough."² To be sure, these opinions of the Earl's judgment, may, perhaps, not have been generally held; but, putting them with the fact that his report on the Vandalia matter was actually rejected, much to his mortification, it is fair to presume that the British government did not allow its colonial policy to be shaped by Lord Hillsborough. With this in view it would certainly be wrong to base conclusions as to British policy in regard to new colonies upon his opinion, though it is not necessary to deny that he did have a certain influence upon it. Now with this understanding of the administration of colonial affairs and the personal influence of Lord Hillsborough, let us examine what was actually done, and what important opinions were actually expressed by those in position to have a real influence upon colonial policy.

It should be pointed out first, however, what has doubtless been quite apparent, that the whole question of new colonies was bound up with the question of western land grants and western settlement. At the court of St. James, practically the whole question was one of western settlement; the idea of new colonial governments being, in the main, merely incidental to it. No evidence appears to show that until 1748³ the British government was ever called upon to form a policy as to trans-montane settlements. Then the Board of Trade reported to the Privy

¹ Franklin to his son, July 14, 1773, Works, V., 196.

² George III., to John Robinson, Oct. 15, 1776. Historical MSS. Commission, Tenth Report, Appendix, Part VI., p. 15.

³ Franklin's Works, V., 32.

Council "That the settlement of the country lying to the westward of the great mountains, as it was the centre of the British dominions, would be for his Majesty's interest, and the advantage and security of Virginia and the neighboring colonies." ¹ The Council approved of this, and in the spring of 1749, not only was the grant to the Ohio Company authorized, but the instructions to the governor of Virginia expressed the hope that "such examples may likewise induce the neighboring colonies to turn their thoughts towards designs of the same nature." ²

Soon, an even larger grant was given to another company. Clearer proof could not be asked to show that the British government in 1748 and 1749 was plainly favorable to settlements west of the Alleghany mountains. The object was, doubtless, to secure the back country from the French, and to get the Indian trade into English channels, but the fact nevertheless remains, that it was, at that time, the British policy to encourage settlement of the west. But the actual settlement was interrupted by the French and Indian War.

Great Britain, before the peace, was in a position to choose between the island of Guadaloupe and Canada with the west. After hesitation, the latter two were taken. But while the question was under discussion, Dr. Franklin published a reply to the arguments advanced against retaining Canada and the west. After discussing and dismissing the apprehension that the American colonies were becoming useless to the mother country, he said: "I shall next consider the other supposition that their growth may render them dangerous. Of this, I own, I have not the least conception, when I consider that we have already fourteen separate governments on the maritime coast of the continent; and, if we extend our settlements, shall probably have as many more behind them on the inland

¹ Franklin's Works, V., 32.

² Ibid., p. 33.

side." He argued that their numbers prevented the colonies from becoming dangerous to Great Britain. Their mutual jealousies prevented union "without the most grievous tyranny and oppression." Perhaps Franklin's argument had some weight in deciding the British government to retain Canada and the west instead of Guadeloupe.

Soon after the peace,¹ the King's proclamation was issued. His majesty ordered the organization of the governments of East and West Florida, Quebec and Granada; but the rest of the land just acquired from France was reserved "*for the present*," "for the use of the...Indians," "as also all the land and territories lying to the westward of the sources of the rivers which fall into the sea from the west and northwest." The king further declared;—"We do hereby strictly forbid on pain of our displeasure, all our loving subjects from making any purchases or settlements whatever, or taking possession of any of the lands above reserved *without our special leave and license for that purpose first obtained.*"²

Now what was the real object of this proclamation? The Annual Register, after remarking on the fact that the largest and best part of the conquered country had not been placed under any government, said: "Many reasons may be assigned for this apparent omission. A consideration of the Indians was, we presume, the principal, because it might have given a sensible alarm to that people, if they had seen us formally cantoning out their whole country into regular establishments. It was in this idea that the the royal proclamation of the 7th of October, 1763, strictly

¹ Canada Pamphlet, Works III., 111. Sparks says (Franklin's Works, IV., 1) that this "pamphlet was believed to have had great weight in the ministerial councils, and to have been mainly instrumental in causing Canada to be held at the peace." If this is true, Franklin's argument may have suggested the King's proclamation as the first step in a far-seeing plan which, admitting the inevitable settlement of the west, proposed to limit at once the colonies "on the maritime coast," *contemplating* the existence of "as many more behind them on the inland side"—the whole object being to reduce America to the then condition of the German empire, i. e., many and weak governments, rather than few and strong ones. This is, however, merely conjecture.

² Franklin's Works, V., 80.

forbids . . . any extension of our old colonies beyond the heads of the rivers. . . ."¹ Washington wrote in 1767, "I can never look upon that proclamation in any other light (but this I say between ourselves) than a temporary expedient to quiet the minds of the Indians. It must fall, of course, in a few years, especially when those Indians consent to our occupying the lands."² But probably the very best authority for the purpose of the proclamation was George Grenville, prime minister of Great Britain when it was issued. He "always admitted that the design of it was totally accomplished, so soon as the country was purchased from the natives."³ This evidence would indicate that the proclamation was merely "a temporary expedient" and that it was not contemplated to place a permanent check on western settlement. This view is supported, too, by the words of the proclamation itself, which says that the west is reserved "*for the present . . . for the use of the Indians;*" orders all settlers to remove from all "lands, which, *not having been ceded to, or purchased by, us,* are still reserved to the Indians;" forbids private persons to purchase lands of the Indians, but when the latter "should be inclined to dispose of the said lands, *the same shall be purchased* only for us;" and that none of "our loving subjects" may take possession of any of the land in question "without *our special leave and license* for that purpose first obtained."⁴ Why not accept as the object of the restrictions the reason given in the proclamation; viz., that the Indians "should not be molested or disturbed in the possession of such parts of our dominions and territories as, not having been ceded to, or purchased by, us, are reserved to them."⁵

¹ Annual Register, 1773, p. 20.

² Washington-Crawford Letters (Butterfield), p. 3.

³ Franklin's Works, V., 37.

⁴ Franklin's Works, V., 80. The italics are mine.

⁵ Ibid., p. 79. Professor Coffin says there seems to be no reason for doubting that

Franklin argued for that view in his successful reply to Hillsborough. The latter contended in 1772 that the "two capital objects" of the proclamation were to restrict the settlements to territory where they could be kept in due subjection to the home government, and also within reach of the trade and commerce of Great Britain.¹ Hillsborough was first made President of the Board of Trade in September, 1763, and so was in position to know its object when the proclamation was issued.

Between the two views, supported as they are, it is impossible to come to a definite conclusion; but considering Hillsborough's alleged "insincerity," the contradictory statements of the then prime minister, and the fact that not the Board of Trade, but the Council had the real decision of questions of policy, is it not probable that Hillsborough's view was wrong? It is quite possible indeed that Hillsborough from the first, intended one thing, while the British government, as a whole, intended something quite different. And we must finally conclude from the evidence at hand that the probable object of the King's proclamation was to quiet the Indians and keep settlers off the unpurchased lands leaving the final disposition of those lands to the future. This view is borne out by subsequent facts.

Three years had scarcely passed after the issuing of the proclamation when the Illinois scheme was agitated and was "really approved" by Lord Shelburne, Secretary of State,² who had a control of colonial affairs independent, at that time, of the Board of Trade. The matter, however, was "referred to the Board of Trade for their opinion" by the King in council.

A great object of colonization was, of course, "to pro-

the proclamation is what it appears to be. *The Province of Quebec and the Early American Revolution*, p. 415. But see his interpretation, pp. 398-431, and especially p. 428.

¹ *Ibid.*, p. 4.

² See above, p. 13.

mote and extend the commerce of Great Britain." When the scheme was referred to the merchants by the Board of Trade, they declared unanimously that if colonies were established at Detroit and in the Illinois country, they would promote and extend the said commerce. With this decision the argument that the new colonies would not meet the great end for which colonies were established, could hardly stand.¹ Indeed the evidence² indicates that up to the time Lord Hillsborough was made both President of the Board of Trade and Secretary of State for the colonies, the British government was favorable to the Illinois scheme. Soon after that, Franklin wrote, "Counsels are so continually fluctuating here that nothing can be depended on."³ This doubtless has reference to the death of Townsend, the illness of Pitt, Hillsborough's promotion, and various changes in the ministry during 1768. It was probably due to these changes that the Illinois scheme failed. Its failure is some evidence that British policy was at that time opposed to western colonization.

In the fall of that same year, however, the British government bought, for a considerable sum, the claims of the Six Nations to a vast tract of land west of the Alleghany mountains. Why was that purchase made if it was the British policy to restrict all settlement to the region east of the mountains? The purchase is strictly in accordance with the theory of the King's proclamation advanced above.

Finally, we see the British government convinced that the establishment of the Vandalia colony would be for the advantage of Great Britain, and the papers for its erection actually drawn up. So we may say that at last it was British policy to establish at least one new colony west of the Alleghany mountains.

¹ Notice, in this connection, Lord Clare's opinion in regard to the fur trade. See above, p. 19.

² See above, pp. 18, 19.

³ See above, p. 19.

That the British ministry expected to exert a strong influence in the establishment and operation of whatever new western governments might be established, there can be no doubt. Of course, too, unauthorized settlements beyond the reach of governmental authority could scarcely meet British approval, as tending only to cause Indian uprisings. Lord Dartmouth, writing to Dunmore in September, 1774, and speaking of the British policy "from the Royal Proclamation of 1763 down to the present time," said: "It has been the invariable Policy of this Country to prevent, by every possible means, any Settlement of the King's subjects in situations where they could not fail of exciting the jealousy of and giving dissatisfaction to the Indians, and where at the same time the Settlers would be out of reach either of the control or protection of the King's Government."¹ This, of course, could not be applied to establishments under conditions similar to those of the proposed Vandalia, else Dartmouth could hardly have called the policy "invariable."

But to sum up all the evidence, what was the British western policy during the third quarter of the eighteenth century? It may have been a consistent one; but from the evidence at hand, we are not able definitely to affirm that it was, for we are still unable to tell the reasons for the King's proclamation and the final failure of the Illinois scheme. Indeed with the many ministerial changes made during the period,² one could hardly expect a consistent policy. Then too, there was doubtless more or less indiffer-

¹ Mass. Hist. Colls. X., 725. Cf. Dunmore's reply in Clark MSS. (Draper Colls.) XV., 4.

² The ministerial changes were especially frequent during the first decade of George III's reign. Notice the following prime ministers:—

1757, Newcastle-Pitt coalition.

1761, Newcastle (Pitt resigned).

1762, Bute.

1763, George (Grenville).

1765, Rockingham.

1766, Chatham.

1767, Grafton.

1770, Lord North.

ence to a subject which must have seemed insignificant to ministries unable to stand long, even by applying themselves closely to what must have seemed, to them much more important business. But, taking all things into consideration, we may conclude that the British government, during the period considered, was in the main, not unfavorable to western settlement under certain regulations. As to new colonial establishments, the Illinois scheme was the first one presented to the government.¹ The favorable receipt of that scheme, and the actual success of the Vandalia scheme, as well as the general favor shown to the land companies, all point to the same attitude with respect to new colonies.

As to what would have been the subsequent policy in regard to the west, if the Revolutionary War had not interfered, it is, of course, impossible to say.² Considering the somewhat uncertain policy pursued before the war, it is not unlikely that some change in the ministry might have introduced a complete change of policy. But when we consider the rapid extension of unlawful settlement beyond the mountains, before the war, in spite of British efforts to prevent it, we see that had there been no Revolution, that same western movement would have continued with constantly increasing force, whether made lawful or not, beyond the limits of Vandalia. The establishment of some kind of government throughout the west would, in time, have been found absolutely necessary. The same arguments which were used to secure approval of the Vandalia scheme, would have been used again, and the Vandalia case urged as a precedent. If, instead of cutting the whole west up into new colonies of the size of Vandalia, it had

¹ Report of the Board of Trade, March, 1768. Franklin's Works, V., 5.

² Thomas Paine in his *Public Good* (p. 27) which appeared in 1790, distinguishes three kinds of lands at the commencement of the Revolution, the third of which were those "held in reserve whereon to erect new governments and lay out new provinces as appears to have been the design." Paine presents something of an argument for this proposition, but in my opinion fails to prove it.

been annexed to various old colonies, as the Northwest was annexed to Quebec, by the Quebec Act of 1774, such an arrangement would very probably have been merely temporary. As the country became settled, the British government would have found it advisable to cut up the country into smaller divisions, and a political geography would have resulted in the west similar to that which may be seen today in Canada, or Australia. The beginning of the Revolution saw Great Britain embarked on a course which, but for that war, must have led, perhaps indirectly, but nevertheless, considering the circumstances and forces at work, almost inevitably, to the cutting up of the west into many separate governmental establishments.

CHAPTER IV.

TRANSYLVANIA.

In spite of the numerous schemes already described, to establish new colonial governments beyond the Alleghanies, the west saw nothing done towards the actual erection of such a government until 1775. In that year there appeared in the west, for the first time, a new establishment which it was proposed to develop into a new government—an establishment which, for a time, was a new and an independent government. It seems probable that the company which set up this new government intended originally to petition for a royal grant and charter, as the Walpole company had done. It was probably thought that the British government, which had already decided favorably in the case of Vandalia, could easily be induced to grant the new company an equally extensive territory just west of the Vandalia colony.¹ As for the Indian title, which stood in the way, the plan seems to have been to buy it from the Cherokees before applying for a grant. At any rate, when the Louisa Company (as the Transylvania Company was first called) was formed at Hillsborough, North Carolina, August 27, 1774, the members signed an agreement "to rent or purchase a certain Territory or Tract of Land . . . from the Indian Tribes now in possession thereof, and do bind and oblige ourselves and our heirs each to furnish his

¹ In their Memorial to Congress, Sept. 23, 1775, the proprietors "flatter themselves that the addition of a new Colony, in so fair and equitable a way, and without any expense to the Crown, will be acceptable to His Most Gracious Majesty, and that Transylvania will soon be worthy of his Royal regard and protection." 4 Am. Archives, IV., 554; N. C. Col. Records, X., 258.

Quota of Expenses necessary towards procuring a grant¹ and settling the country."² At that time the company was composed of Richard Henderson, John Williams, Thomas Hart, Nathaniel Hart, John Luttrell and William Johnston. Not very long afterwards, James Hogg, David Hart, and Leonard Henly Bullock, were admitted and the name "Transylvania Company" assumed.³ There was a tradition that Patrick Henry and Thomas Jefferson desired to join the company, but that Colonel Henderson preferred not to have them admitted "lest they should supplant the Colonel as the guiding spirit of the company."⁴ Patrick Henry himself declared that Henderson invited him to join, but he "uniformly refused and plainly declared his strongest disapprobation of their whole proceedings."⁵ At all events the membership of the company seems to have remained confined to the nine men mentioned above, all from North Carolina.

In the spring of 1775, the Cherokee chiefs were gathered to meet Henderson and his friends at Watauga, in what is now northeastern Tennessee. After considerable parley, a treaty was executed March 17th. In consideration of several loads of merchandise, valued at £10,000, the Cherokees deeded the territory bounded as follows: "Beginning on the said Ohio River at the mouth of Kentucky, Ehenoca or what, by the English, is called Louisa River, from thence running up the said River and the most northwardly fork of the same to the head spring thereof, thence a South East

¹ This might possibly be taken as meaning a grant from the Indians merely, and indeed the cession which the company finally obtained was sometimes called "the great grant," but it was not customary to apply that term to an Indian cession. Moreover we would expect the Company to be planning to get a crown grant, as differences between the colonies and the mother country had not at that time reached the point where separation was expected.

² Draper Colls., Ky. MSS., I.

³ Ibid.

⁴ Extracts from Jas. Alves's Henderson Papers, in Draper Colls. Kentucky MSS., II.

⁵ Patrick Henry's deposition, made at Williamsburg, June 4, 1777. Draper Colls., Kentucky MSS., I. This deposition shows that Patrick Henry was concerned in another scheme to purchase lands from the Cherokees.

course, to the top ridge of Powels' mountain, thence westwardly along the ridge of the said mountain unto a point from which a north west course will hit or strike the head spring of the most Southwardly branch of Cumberland River, thence down the said River, including all its waters, to the Ohio River, thence up the said River as it meanders to the Beginning."¹ As the meaning of the phrase "including all its waters" has been subject to some dispute, it may be well to notice what those present at the treaty supposed it to mean, or in other words, what they regarded as the southern boundary of the cession. In 1777 and 1778 a number of depositions in regard to the Watauga treaty were taken by Virginia authorities. One man who was there declared, under oath, that in his opinion the boundary line "was to keep the dividing Ridge between Cumberland" and Tennessee Rivers.² Another man, under oath, gave some particulars of the treaty. He said that after some parleying, "The Indians then agreed to sell the land as far as Cumberland River, and said Henderson insisted to have Cumberland River and the waters of the Cumberland river, which the Indians agreed to."³ The depositions of other men describe the southern boundary in the same language as the deed, while there seems to be no evidence that anyone present at the treaty regarded that boundary to be the Cumberland River merely.⁴ Major Pleasant Henderson⁵ described the southern boundary as a westerly line crossing "the Cumberland mountains so as to strike the ridge which divides the waters of the Tennessee River from those of the Cumberland, and with that ridge to the Ohio River."⁶ So we see that at the time,⁷ the watershed between the two

¹ See attested (1803) copy from the original, and also the complete copy of the Watauga treaty in Draper Colls. Kentucky, MSS., I., Butler's Kentucky, pp. 503-506.

² Deposition of Chas. Robertson, Oct. 3, 1777,—Draper Colls., Kentucky, MSS., I.

³ Deposition of Jas. Robinson,—Ibid.

⁴ See Depositions in Draper Colls., Kentucky MSS., I.

⁵ Brother of Richard Henderson.

⁶ Copy of Pleasant Henderson's MS., Draper Colls., Kentucky MSS., II.

⁷ The petition from the inhabitants of Kentucky, presented to the Virginia House of

rivers seems to have been regarded as the southern boundary of the cession, as indeed one would naturally suppose from the phrase "including all its waters."¹ It is however, undeniable, that the Cumberland River was, in 1785 and afterwards, officially recognized as "the southern boundary of the lands sold to Richard Henderson & Co.;"² but in mapping the outlines of the territory over which the Transylvania Company claimed, and (as much as any civilized government of the time) exercised jurisdiction, and which was called Transylvania,³ it seems more reasonable to take the natural interpretation of the deed⁴ supported as it is by the depositions of men present at the treaty, and the plain statement of Richard Henderson's brother. The so-called "path-deed" was secured by Henderson and Company at the same time, so that they might have territorial connection with the old colonies, but as the comparatively small piece of land thus obtained was not considered a part of Transylvania proper and was not called 'Transylvania' it need not be considered here.

Delegates, Oct. 8, 1776, described the territory as extending "from the southernmost waters of the Cumberland river." *Journal of Virginia House of Delegates*, Oct. 8, 1776, (Copy in Draper Colls., Clark MSS., XIV., p. 162.)

¹C. C. Royce (Report of the Bureau of Ethnology, 1883-4, p. 149) says: "Although a literal reading of these boundaries would include all the territory watered by the Cumberland River and its branches, the general understanding seems to have been . . . that Henderson's purchase did not extend south of the Cumberland River proper."

²Report of treaty commissioners to Richard Henry Lee, Pres. of Cong., Dec. 2, 1785; and later, letter of Gen. Knox, Sec. of War, to Pres. of the U. S.—*Am. State Papers*, Indian Affairs, I., 39.

³See, in this connection, the complaint of James Davis,—*Draper Colls.*, Kentucky MSS., II.

⁴Those who have taken the other view have failed to map correctly that part of the southern boundary of Transylvania, which is less ambiguous in the deed, viz., the line running along the ridge of "Powels' Mountain . . . unto a point from which a north-west course will hit or strike the head spring of the most Southwardly branch of the Cumberland River." C. C. Royce (map accompanying Rep. of Bureau of Ethnology, 1883-4) evidently assumes the boundary as conceded later by the U. S. treaty commissioners. Professor Turner (map accompanying his article in *Am. Hist. Rev.*, Oct., 1886, appears to have followed Royce. Why the U. S. treaty commissioners should have conceded so much to the Cherokees does not appear. There is some doubt as to what range was referred to by "Powels' mountain." Royce admits that this is uncertain. The range that is called the Clinch Mountains best accords with the boundary description, and was not unlikely the range referred to.

⁵Deposition of Nathaniel Henderson, Oct. 27, 1778, *Draper Colls.*, Kentucky MSS., I.



TRANSYLVANIA.

One point is noticeable in regard to the northeastern boundary, viz.: that it is for most of its length, the same as the southwestern boundary of Vandalia. Evidently Henderson well understood what the Vandalia boundary was, and planned that his colony should join on the southwest.

But to return to the actual progress of the company. In spite of Governor Dunmore's proclamation, issued March 21, 1775, calling upon all civil and military officers "to use their utmost endeavors to prevent the unwarrantable and illegal designs of the said Henderson and his abettors," and ordering that if he or anyone else should refuse to depart from lands within the limits of Virginia which were held by no other than an Indian title, "he or they be immediately fined and imprisoned in the manner the laws in such cases direct"¹—in spite of this proclamation and opposition also on the part of the governor of North Carolina² the number of Transylvania settlers, already considerable for the time, kept on increasing.

The Indians having shown a hostile disposition, Daniel Boone, who appears to have been looking after Henderson's interests in Transylvania, wrote to him, " . . . My advice to you, sir, is to come or send as soon as possible. Your company is desired greatly, for the people are very uneasy, but are willing to stay and venture their lives with you . . . "³ But Colonel Henderson was already on his way west and reached Fort Boone (Boonesborough)

It is also shown by the fact that the deed for the "great grant" only was exhibited to the Transylvania legislature, Henderson at the time requesting that an entry of it be made in the journal, showing the extent of Transylvania "including the corners and abutments of the lands or country contained therein, so that the boundaries of our colony may be fully known and kept on record."—*Journal of the Proceedings of the House of Delegates, et cetera.* Collins, Kentucky, II., 506; Butler's Kentucky, p. 513.

¹ Dunmore's proclamation, Draper Colls., Kentucky MSS., I.; 4 Am. Archives, III., 1385; N. C. Col. Records, X., 308. See also Dunmore's letter of same date to William Preston directing that copies of the proclamation be scattered "throughout the Back Country," Draper Colls., Preston Papers, IV., No. 6.

² North Carolina Colonial Records, X., 253, 323.

³ Collins's Kentucky, II., 498.

April 20th.¹ He had already settled on a form of government for his proprietary. He referred to it in his journal entry for April 4, saying. "This plann is exceeding simple and I hope will prove effectual. 'Tis no more than the peoples sending Delegates to act for them in Gen^l Convention." The need of some kind of civil government was becoming every day more apparent. Before he had been among the settlers three weeks Henderson seized a favorable opportunity and addressed them on the subject of government. The following entry in his journal, May 8th, tells us about all we know of what may perhaps be called the constitution of Transylvania, and the manner in which it was adopted and put in operation. "Our plan of Legislation, the evils pointed out—the remedies to be applied, &c., &c., &c, were acceded to without Hesitation—The plann was plain & simple—'twas nothing novel in its essence a thousand years ago it was in use, and found by every years' experience since to be unexceptionable—We were in four distinct settlemt^s Members or delegates from every place by free choice of Individuals they first having entering into writings solemnly binding themselves to obey and carry into Execution such Laws as representatives should from time to time make, concurred with by a Majority of the Proprietors present in the Country—The reception this plann met with from these Gent^l., as well as a Capt. Floyd, a leading man in Dicks river settlement, gave us great pleasure, and therefore immediately set ab^t. the business, appointed Tuesday the 23^d Instant at Boonsbo'^{sh}, and according made out writings for the different Towns to sign and wrote to Cap^t. Floyd appointing an Election &c. Harrodsburgh & the Boiling spring settlemt^s Rec^d their sum. Verbally by the Gent^l. afs^d."

By this quasi constitution, the proprietors became the executive branch of the government, with the power of ab-

¹ See Henderson's "Journal of an expedition to Cantuckey in 1775" in Draper Colls. Kentucky MSS., I. Extracts are printed in Collin's Kentucky, II., pp. 498-501.

solute veto. The company insisted on that point because otherwise "the delegates of any Convention that might be thereafter held would have it in their power to destroy the claim of the proprietors."¹ At least the first legislative apportionment was also in the hands of the proprietors, who gave directions that six members be returned from Boonesborough, three from Harrodsburgh,² four from Boiling Spring, and four from St. Asaph.³ The "Convention" met on the day appointed under a great elm tree, and after electing officers who were approved by the proprietors, listened to a speech from Henderson. He declared that laws were "indispensably necessary," and "we have a right to make such laws without giving offense to Great Britain, or any of the American colonies; without disturbing the repose of any society or community under Heaven."⁴ He then recommended various subjects as suitable for legislation. The following laws were passed:

1. Establishing courts of judicature.
2. Regulating a militia.
3. To punish criminals.
4. Against swearing and Sabbath breaking.
5. For writs of attachment.
6. Ascertaining clerk's and sheriff's fees.
7. To preserve the range.
8. To improve the breed of horses.
9. For preserving game.

Besides passing these laws, eighteen articles of agreement between the proprietors and the representatives were drawn up and approved by both. They were little more than an elaboration of Henderson's "plann." One article provided for annual election of delegates, and another to add another branch to the legislature; viz.—a council, "after the

¹ Deposition of Nathaniel Henderson. Draper Colls., Kentucky MSS., I.

² For some reason four were actually returned from Harrodsburgh.

³ "Journal of the Proc. of the House of Delegates or Representatives of the Colony of Transylvania."—4 Am. Archives, IV., 548; Butler's Ky., p. 506; Collins' Ky., II., 501.

⁴ Journal of the Proceedings. Collins' Kentucky, II., 502; Butler's Kentucky, p. 508.

strength and maturity of the colony will permit." But this council should not exceed "twelve men possessed of landed estate who reside in the colony."⁴ All this was important business, but five days was all the time required to transact it by this pioneer legislature of the west. It adjourned May 27, "in good order, everybody pleased."² The adjournment was to the first Thursday of the following September, but the "Convention" never met again.

Henderson remained awhile in Transylvania and then returned home. A meeting of the proprietors was held at Oxford, Granville Co., North Carolina, Sept. 25, 1775.³

At this meeting, James Hogg was appointed to represent Transylvania in the Continental Congress then sitting at Philadelphia. At the same time a memorial to Congress was drawn up, reciting the impossibility of calling a convention of the settlers in time to elect a delegate to that Congress, but engaging their concurrence in the selection of Mr. Hogg. The memorialists "hope and earnestly request that Transylvania may be added to the number of the United Colonies, and that James Hogg, Esq., be received as their delegate and admitted to a seat in the honourable the Continental Congress." Mr. Hogg reached Philadelphia, October 22. He soon wrote back, "You would be amazed to see how much in earnest all these speculative gentlemen are about the plan to be adopted by the Transylvanians. They entreat, they pray, that we may make it a free Government."⁴

Samuel and John Adams were friendly to the new colony but feared that it would increase the complications with the King, with whom the Congress hoped to become reconciled, by protecting "a body of people who have acted in de-

Journal of the Proceedings, Collins's Kentucky, II., 507; Butler's Kentucky, p. 13. These eighteen articles might be called the completed Transylvania constitution.

² Henderson's Journal, May 27.

³ See Minutes of this meeting including the memorial to Congress, in 4. Am. Archives, IV., 553 et seq.; N. C. Col. Records X., 256 et seq.

⁴ Hogg to Henderson, 4. Am. Archives, IV., 545. Hogg adds that "many of them advised a law against negroes."

fiance of the King's proclamations,"¹ Silas Deane of Connecticut said he would send agents to look the country over, and thought, if their report were favorable, many Connecticut people would emigrate to Transylvania; but he would have nothing to do with it unless pleased with the form of government.²

To Jefferson and Wythe, Hogg said nothing of his pretensions to seat in Congress, but told them that the Transylvania Company had sent him to announce their "friendly intentions towards the cause of liberty." Hogg reports that Jefferson said it was his wish to see a free government extending back of Virginia to the Mississippi if properly united to that colony, but he would not consent that Transylvania should be acknowledged by Congress until a Virginia Convention had approved of it. He thought, however, that the approval of the next Convention might be obtained if the Company would send one of their number to present the case.³ That Convention was indeed appealed to, but not in a way that promised well for the company. A petition with eighty-eight signatures came from the inhabitants and "intended settlers" of Transylvania. The petitioners complain that they were allured to the country by the easy terms of settlement and the "indefeasible title" which they were assured the Company was able to make. Now they are alarmed by the advance of the purchase price from 20 shillings to 50 shillings per hundred acres,⁴ and the fear that his Majesty will not confirm the Company's title in view of the fact that the land had been previously ceded to the crown from the Six Nations, who had claimed to be the sole possessors of the territory as far as the Tennessee river. They "expect and implore to be taken under the protection of the honorable Convention of the

¹ Hogg to Henderson, 4. Am. Archives, IV., 544.

² Ibid., p. 545.

³ Ibid., p. 544.

⁴ This advance was determined upon by the proprietors at their meeting at Oxford Granville Co., N. C., Sept. 25, 1775.

Colony of Virginia, of which we cannot help thinking ourselves still a part, and request your kind interposition in our behalf that we may not suffer under the rigorous demands and impositions of the gentlemen styling themselves proprietors."¹ The petition closes with the request that, should the case be thought to come more properly before "the General Congress," the Convention would instruct the Virginia delegates "to espouse it as the cause of the colony."

Meanwhile the Transylvania company was exercising the executive power in their little commonwealth. John Williams, a member of the company, wrote from Harrodsburg, March 3rd, 1776, that there had been "some disturbances and dissatisfaction among the people" (referring evidently to what had called out the above petition), but "they were trifling and hardly worth mentioning."² Writs of election were issued for another "Convention" to sit at Harrodsburg, April 10th, and this time it was intended that the inhabitants of Powell's Valley should elect delegates also.³ But some of the Transylvanians feared that "the proprietors would wish to establish some laws which might operate to their disadvantage," and requested that the "Convention" might be postponed until a "few men of better abilitys come among them to assist in making such laws."⁴ The proprietors assented to this on their promising faithfully to observe the laws passed at Boonesborough the year before, and the election was postponed.⁵ It is not improbable that this postponement was desired so as to await the return of George Rogers Clark, who had gone to Virginia in the previous fall. While there he sounded public opinion on the Transylvania affair and made some interesting plans. He tells them in his memoir as follows:—"While in Virginia I found there was various op-

¹ 4 Amer. Archives, VI., 1528; Collin's Kentucky, II., 510.

² John Williams to Col. J. Martin. Draper Colls., Clark MSS., XVI., p. 54.

³ Ibid.

⁴ Ibid.

⁵ Ibid.

pinions Respecting Henderson Claim. many thought it god, others doubted whether or not Virginia could with propriety have any pretensions to the Cuntry. this was what I wanted to know. I immediately fixed on my plans, that of assembling the people, get them to elect deputies and send them to the assembly of Virginia, and treat with them Respecting the Cuntry. If Valuable Conditions was procured, to declare ourselves Citizens of the state; otherways Establish an Independant Government, and by giving away great part of the Lands and disposing of the Remainder otherways we could not only gain great numbers of Inhabitants, but in good measure protect them to carry this scheam into effect."¹

Returning west in the spring of 1776, Clark proceeded with his plan. He called the people to a general meeting at Harrodsburg, June 6th, without announcing its object. It happened that Clark himself was unable to reach Harrodsburg until evening of the appointed day. The people, according to Clark's account, had been in confusion for some time, but at length had concluded that the object of the meeting was to elect delegates to the Virginia Assembly and draw up a petition asking that they be received into that body, and that the Transylvania settlements be organized into a county of Virginia. Clark found the election of delegates too far advanced to change to the principle of deputies with authority from the people to treat with another power.² Clark himself, and J. G. Jones were elected delegates to the Virginia Assembly, and in a few days set out for Williamsburg. They carried with them "The Humble Petition of the Inhabitants of Kentucke (or Louisa) River on the Western parts of Fincastle County,"³ which made complaints against Henderson and Company similar to

¹ Clark's Memoir. The original document is in Draper Colls., Clark MSS., XLVII., pp. 1 et seq. I have copied from it as he wrote it, merely adding punctuation.

² Clark's Memoir, p. 2.

³ This petition may be found in Draper Colls., MSS., XIV., p. 148. On p. 154, *ibid.*, is "The Humble Petition of the committee of West Fincastle of the Colony of Virginia, etc." Both petitions are to the same purpose.

those of the former petition, and expressed the hope that Clark and Jones would be received as delegates in the Assembly.

Before reaching Williamsburg, the delegates learned that the Assembly had adjourned, Jones turned back, but Clark kept on hoping to get some powder from the Virginia authorities for use in "Kentucke." Governor Henry "appeared much disposed to favour the Kentuckyins," but the council giving him a rather doubtful reception, Clark returned the order for 500 pounds of powder which was to be merely loaned "as to Friends in distress," and decided to return home and organize an independent government.¹ He told the Council that he "was sorry to find that we should have to seek protection elsewhere, which I did not doubt of getting."² This threat alarmed the Council, and the powder was at once given outright and even transported freely as far as Pittsburg.³

The Virginia Assembly met in the fall. Clark and Jones were refused seats, probably because of their irregular election before the organization of Kentucky County. Colonel Richard Henderson was there working vigorously to prevent such an organization. But in spite of this and other opposition,⁴ a bill was finally passed to organize the new county of Kentucky. December 21, 1776, the Council ordered that commissions be issued to county officers for Kentucky.⁵

So a large part of "the colony of Transylvania" became peaceably incorporated into the state of Virginia. After

¹ Clark's Memoir, p. 7.

² Ibid. Where Clark thought of seeking protection is not clear. There is an interesting correspondence on the subject between William Wirt Henry and L. C. Draper (Clark MSS., XVI., pp. 91-94) in which the former thinks Clark intended to appeal to the Spaniards, while Draper thinks that nothing more is meant than a threat to set up an independent government.

³ Ibid.

⁴ A member from Fincastle County was also much opposed, as he wished Kentucky to be annexed to his own county. Clark's Memoir, p. 7.

⁵ Journal of the Va. Council, Dec. 21, 1776.—Draper's manuscript copy in Clark MSS., XVIII., p. 13.

struggling for nearly two years. Richard Henderson succeeded in getting for his Company a large compensatory grant on the Ohio and Green rivers.¹ North Carolina appropriated the remainder of what was considered the Henderson purchase, giving the company a grant in Powell's Valley; "and thus vanished the golden dream of Richard Henderson and Company."²

If a different course had been followed—the course which Clark planned to follow in case the settlements had declared their independence, viz.: giving away much of the land and selling the rest at a low figure, besides allowing the people a more liberal government—then the self-interest of settlers would probably have led them to continue that support of the proprietors and their measures which they seem to have given at first. The absence of marked opposition from the Virginia patriots to an independent and liberally governed Transylvania is noticeable. The framers of Virginia's first constitution plainly contemplated the erection of a new government within their charter limits west of them.³ The state government even expressed grave doubts as to whether the Assembly would be willing to receive Kentucky,⁴ whose people were freely offering themselves to Virginia. This seeming indifference on the part of Virginia would, if continued, have materially aided the Transylvanians in maintaining independence, if they had persisted in it. An independent Transylvania, or an independent Kentucky led by George Rogers Clark, during the Revolutionary War, might have made a marked difference in subsequent American history, particularly if the colony had allied itself with Spain, or adhered to Great Britain in the struggle. In either case the United States would probably have been limited at the peace to the ter-

¹ Littell's Laws of Kentucky, III., 587; Hening, IX., 571.

² Nathaniel Hart (whose father was a member of the Company) to Mann Butler, October, 1833. Draper Colls., Kentucky MSS., II.

³ Va. Const. of 1776. Hough's Am. Const., I., 430; Poore's Constitutions, II., 1912

⁴ Clark's Memoir, p. 6.

ritory east of the Alleghany mountains. Had the country not been united to Virginia as it was, its history would most likely have been similar to that of Vermont—really much in sympathy with the American cause and continually knocking at the doors of Congress for admission to the Confederacy; but, if not getting it, taking position as a quasi independent and sovereign state, holding aloof, and ready to join with which ever side should come out victor in the contest.¹

¹ It will be attempted to show in a later study that this was the attitude of Vermont during a large part of the Revolutionary War.

CHAPTER V.

NEW STATE SCHEMES PRIOR TO 1780.

Thus far we have had to do with schemes for new British colonies. With the Declaration of Independence the idea of new colonies gives place to that of new states. The change was, however, by no means a sharply defined one. One attempt to set up a new government began probably before American independence was declared. It involved the region about the head-waters of the Ohio, which was claimed by both Pennsylvania and Virginia, and incorporated by the latter as a part of West Augusta county. The scheme was set on foot in June or the beginning of July, 1776, by David Rogers, (who was a member of the Virginia Assembly), and others.¹ Certain definite boundaries were proposed and a memorial exhibited to several persons at Pittsburg.² The people were directed to "choose men to meet and Consult whither application should be made to Congress for laying off the country within the said limits into a new Government or whether they would not immediately proceed to Colonize themselves by their own authority, and send Delegates to Congress to represent them."³

Another proposition was that the people "on the Western Waters" should decide whither a "joint Petition of the Inhabitants" should be presented to Congress "praying their Interposition in settling the Disputes which have occasioned

¹ Memorial of the Committee of West Augusta to the Va. House of Delegates.—Va. Senate Journal, Oct. 30, 1776. MS. copy in Draper Colls., "Pa., N. Y., Va., O., Ky., and Tenn. Papers," IV., 32.

² Ibid. Among the "Yeates Papers," owned by the Historical Society of Pennsylvania, there is a draft of this memorial, but in certain particulars it differs from the one apparently presented to the Virginia House of Delegates.

³ Ibid.

our Unhappiness" or whether they should take things into their own hands "by our immediately colonizing ourself[es] by our own Authority, and sending our Delegates to the said Congress to represent us as the fourteenth Link in the American Chain."¹ It was "recommended to the different Districts on the Western Waters to meet....and give their free Voice which of these Modes is most agreeable, and it is hoped that the Minority will generously give up to the Majority; and if a Majority is found in Favour of the former Mode all will sign the said Petition, and if a Majority is found in Favour of the latter that all will acquiesce then and there in Choice of two Members for a Convention to be held at Becket's Fort four Days after such Election for the express Purpose of forming a new Mode of Government for the intended new Colony Choosing two Members to represent us in Congress, Laying out the said Colony in Counties, and issuing their Summons for calling an Election of legislative & Executive Officers agreeable to the Plan of Government so formed."²

Whether this meeting was ever held we do not know. In July, Rogers and others refused to take an oath prescribed by the Virginia convention and "persisted in using all their influence to make proselytes to their favorite scheme of a new Government."³ By the first of August a petition to Congress was in circulation.⁴ That document pointed out the evils to which the petitioners were subjected on account of the conflicting claims of Pennsylvania and Virginia to jurisdiction over them, and the "embarrassing and perplexing" land claims of George Croghan, and the Indiana and Vandalia companies. The petitioners say they are "neither Politicians nor Orators," but "are at least a rational and Social People. They have "emigrated from

¹ MS. copy in possession of the State Historical Society of Wisconsin.

² Ibid.

³ Memorial of the Committee of West Augusta.

⁴ Crumrine (*Hist. of Wash. Co., Pa.*, p. 187) proves this date from a letter of Jasper Yeates to James Wilson, July, 1776.

almost every Province of America." but "having imbibed the highest and most extensive Ideas of Liberty," they "will with Difficulty Submit to the being annexed to or Subjugated by (Terms synonymous to them) any one of those Provinces, much less the being partitioned or parcelled out among them." They protest that they will not "Suffer themselves, who might be the happiest & perhaps not the least useful Part of the American Confederacy as forming a secure, extensive & Effectual Frontier and Barrier against the Incursions, Ravages & Depredations of the Western Savages, to be Enslaved by any set of Proprietary or other Claimants. or arbitrarily deprived and robbed of those Lands & that Country to which by the Laws of Nature & of Nations they are entitled as first Occupants, . . . whilst the Rest of their Countrymen softened by Ease, enervated by Affluence & Luxurious Plenty, & unaccustomed to Fatigues, Hardships, Difficulties or Dangers, are bravely contending for and exerting themselves on Behalf of a Constitutional, natural, rational & social Liberty." They contend that "no Country or People can be Either rich, flourishing, happy or free whilst annexed to or dependent on any Province, whose Seat of Government is those of Pennsylvania & Virginia, four or five hundred Miles distant, and separated by a vast, extensive & almost impassible Tract of Mountains, by Nature itself formed and pointed out as a Boundary between this Country and those below it."

The memorialists request finally, "that the said Country be constituted, declared and acknowledged a separate, distinct & independent Province & Government, by the Title & under the Name of 'The Province & Government of Westsylvania', be impowered & enabled to form such Laws and Regulations & such a System of Polity & Government, as is best adapted & most agreeable to the peculiar Necessities, local Circumstances & Situation thereof, and its Inhabitants invested with every other Power, Right, Privi-



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lege & Immunity, vested or to be vested in the other American Colonies; be considered as a Sister Colony, & the fourteenth Province of the American Confederacy, that its Boundaries be: Beginning at the Eastern Branch [bank] of the Ohio opposite the Mouth of the Scioto, and running thence in a direct Line to the Owasioto Pass, thence to the Top of the Allegheny Mountain, thence with the Top of the said Mountain to the Northern Limits of the Purchase made from the Indians in 1768, at the Treaty of Fort Stanwix aforesaid, thence with the said Limits to the Allegheny or Ohio River, and thence down the said River to the Beginning."¹

Such was "The Memorial of the Inhabitants of the Country West of the Allegheny Mountains."² They claimed that at least 25,000 families had settled within the above boundaries since 1768. But in spite of these numbers and the arguments of the petitioners Congress gave them no encouragement. Indeed there is no evidence that Congress even considered the petition.

But before the year was out another proposition for a new western state was on its way to Congress. Silas Deane, writing from Paris Dec. 1, 1776, to the Secret Committee of Congress, made suggestions about the western lands. He thought the tract between the Ohio, Mississippi, and the Great Lakes might, if managed properly, be made to defray the whole expense of the war.³ In order to enhance its value a new government should, he suggested, be planted "at the mouth of the Ohio, between that and the Mississippi."⁴ A grant "equal to two hundred miles square" should be given "to a company formed indiscriminately of Europeans and Americans, which company should form a distinct state, confederated with and

¹The State Historical Society of Wisconsin has a complete copy of this petition taken from a copy among the Yeates Papers in possession of the Historical Society of Pennsylvania.

²The petition was so entitled.

³Silas Deane to Secret Committee of Congress. 5 Am. Archives, III., 1021.

⁴Ibid., p. 1021.

under the general regulations of the United States General of America." This company should consist of at least one hundred persons, and receive its grant on condition that within seven years it should have a certain number of families settled on the land and a civil government established, "regulated and supported on the most free and liberal principles, taking therein the advice of the honorable Congress of the United States of America."

Deane's scheme further provided that the new state should not be taxed until it had a thousand families, when it should contribute to "the publick expenses of the continent, or United States" in proportion to its population and "be entitled to a voice in Congress."¹ We have seen that about a year before this Silas Deane was much interested in the Transylvania undertaking.² James Hogg thought then that he was meditating settling in their new colony himself with a party of Connecticut adventurers.³ It is not improbable then, that when he suggested to the secret committee of Congress the advisability of planting a new state in the West, he hoped to take a prominent part in its affairs himself. If his recommendation had been acted upon, and a grant given to "a company formed indiscriminately of Europeans and Americans," he, as agent of Congress in Paris, was in good position to enlist the Europeans in the enterprise. But, so far as we know, the suggestion of Silas Deane was never even considered by Congress, and he himself, if he ever had the idea of molding a new state government and wielding a strong power in it, must have soon abandoned it.

In conclusion, it needs only to be pointed out that in spite of the fact that every one of the numerous schemes to form governments west of the Alleghany mountains had failed,

¹ Silas Deane to Secret Committee of Congress, Dec. 1, 1776. 5 Am. Archives, III., 1021.

² See above, p. 58. See also his long letter to James Hogg, laying down liberal principles of government which he thought a new colony should adopt. 4 Am. Archives, IV., 556; N. C. Col. Records, X., 300-304.

³ Hogg to Henderson. N. C. Col. Records, X., 376.

some few giving promise for a time of ultimate success, but most of them meeting with little or no real encouragement from the first—in spite of this there had been, when Congress took up the subject, a pretty constant agitation of the question throughout the whole preceeding quarter century. During that time the American people as a whole must have contemplated more than once the possibility of new governments being set up in the West. Although the idea received a check when the back land was all claimed as within the legal limits of certain of the thirteen states, and it was not generally held that Congress had succeeded to the right of the crown to carve out new governments in the west at will, nevertheless the statesmen of the Revolution could hardly have come finally to the task of dealing with the west without remembering something of those attempts, and being influenced by the fact that until then there had been a widespread expectation that separate governments on a political equality with those of the sea-board, would in time be established beyond the mountains. It was another question which brought Congress to take its first action in favor of new states, but had that action not been taken at that time, and had the old states held on to the western land, it must have been recognized sooner or later, that the West had not gained its proportionate share in the liberty acquired by the Revolution, that concerning the local colonial governments which had been expected, the West had plainly lost by the Revolution. We may fairly say that the schemes for new western governments prior to congressional action on the subject, served as a not unimportant factor in ushering in that action.

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MUNICIPAL HISTORY AND PRESENT ORGANIZATION
OF THE CITY OF CHICAGO

BY

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A THESIS SUBMITTED FOR THE DEGREE OF DOCTOR OF PHILOSOPHY IN THE
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PREFACE.

There are certain inherent difficulties in the preparation of a monograph of this character. In the first place the vast accumulation of materials that form the basis of such a study, renders it exceedingly difficult to secure system and to trace definite tendencies in the midst of the ceaseless change that is, and ever has been manifest throughout the municipal history of Chicago. The unsatisfactory state of knowledge concerning the American city is chiefly due to the fact that a careful study of the sources of municipal government has been confined to a very few cities, and to a still smaller number of the state systems. Not until the monographic period of investigation has yielded its slow and painstaking results will the subject of municipal government be placed upon a firm and safe basis for generalization. The question of selection and emphasis therefore becomes of primary importance and affords a wide latitude for differences of opinion. In the midst of a vast accumulation of codes, special laws, charters, ordinances, etc., we were gradually led to the view that the purposes of this study would be best conserved by the presentation of the outlines of the institutional development and present structure of the city to the exclusion of a treatment of the many important problems of the current administration.

In order to assist in a more minute study of special phases of the city administration, as well as to relieve the body of the text from an accumulation of footnotes, a carefully prepared bibliography of the primary sources has been made.

In the second place the determination of what materials were organic in reference to the municipality and what were supplementary, has not always been an easy task. Many legislative

enactments affected as deeply the organization of the city as the change from charter to charter. This problem became still more complicated in pointing out the organic relation existing between the institutions of the city and its varied social and administrative needs.

After the manuscript had passed to the printer the legislature in special session for 1897-98 passed two acts which have modified two important sources of the municipal weakness of Chicago. These acts reorganized the system of taxation, and prescribed the methods of making party nominations. Some of the defects of the former system have been removed by this legislation. These changes will be noted in the appendix.

In the preparation of this monograph I have received helpful suggestions from Professors Richard T. Ely and Frederick J. Turner, both of the University of Wisconsin; Judge M. F. Tuley of the Cook County Circuit Court of Illinois also kindly consented to read the manuscript.

It must however be borne in mind that the writer assumes all responsibility for any error in the statement of facts and of conclusions.

SAMUEL E. SPARLING.

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MUNICIPAL HISTORY AND PRESENT ORGANIZATION OF THE CITY OF CHICAGO.

CHAPTER I.

INTRODUCTORY.

The metropolitan city occupies an exceptional administrative position among the municipalities of the world. Wherever a uniform municipal organization obtains in the modern state, with but few exceptions, special provisions are made for the great urban center. Its political, commercial and social importance has given it a unique place in the administrative system of the state. Furthermore, the more important of the metropolitan cities are passing through a transitional stage of institutional organization. The administrative county of London is a tentative substitute for the amorphous conditions that prevailed in the Greater London prior to the law of 1888. The score of local *mairies* and central prefects that have diffused executive power in the city of Paris exhibit an important struggle between the forces of centralization and decentralization in the large city. The question of the reorganization of Paris is under consideration. The Greater New York begins a new epoch under the provisions of a charter, embodying the principles of territorial and administrative consolidation. The conditions prevailing in the city of Chicago must find their ultimate solution in a consolidated and simplified charter, which will subordinate all the varied administrative interests, scattered among towns, parks and municipality, under one central responsible organ.

The transitional phase of the American municipality renders it exceedingly difficult to point to definite processes in its evolu-

tion. In the midst of varied kinds of charter organization, broad outlines are discernible, although at times effaced in reactionary tendencies, or in retarded development.

The charter evolution of the city of Chicago typifies in brief the changes that have followed in the history of the American municipal development in general. The common council was the central organ in the few cities that existed before the American Revolution. In the first charter of the town of Chicago, the town board was the only organ that was instrumental in ministering to the wants of the village. Furthermore, slight traces of an aristocratic nature appeared in the freehold qualifications of the suffrage. Thus as a result of Eastern models, as well as of the prevailing elementary conditions, the common council absorbed all administrative and legislative functions. Gradually executive power has issued from this elementary town board, and its successor, the common council. The first consideration in this evolution is the principle of popular sovereignty which followed with the widespread use of the suffrage in the election of local officers. In Chicago, as elsewhere, the election of the mayor passed from the council to the people and became the starting point in the separation of executive and legislative functions, and gradually vested the mayor with the elements of administrative power and direction. With each succeeding charter, the position of the mayor was strengthened by the addition of new powers taken from the council. Although the common council remains today as the central fact in the municipality of Chicago, the theory of executive concentration has been consistently followed out until the mayor is possessed of the responsible powers of the direction and supervision of the administration, as well as of appointment and veto. He has been given many financial and legislative powers formerly exercised by the council, which places this body in a weakened position before the municipality, shorn of many of its venerable privileges. The chasm that separates the mayor and council is partially bridged on the one hand by the executive veto of the ordinances of the municipal legislature, and on the

other hand by legislative confirmation of the appointments of the executive. These checks, designed to create harmony in administration and to restrain hasty action in appointment and legislation, have reared two almost independent organs appealing for popular favor. Where responsibility was expected, irresponsibility has resulted. Widespread distrust of the representative organ of the city has started strong tendencies toward executive concentration, which has been consistently worked out in the Chicago system. The mayor and his heads of departments stand in almost complete separation from the council. The personal relation is only maintained in the presence of the mayor as the presiding officer of the municipal legislature and in the confirmation of executive appointments, and in his veto over the city ordinances.

A second fact of general significance appears in the changes that have been noted. But few American municipalities have escaped the era of boards. Special legislation has been the responsible factor in this wide diffusion of administrative functions among nominally independent authorities. Particular problems have been met by the creation of specific boards with only partial control exercised by the municipality. Responsibility and administrative coherence were lost in disintegration and confusion. During the early years of the city of Chicago, special legislation created a number of quasi-public boards for the discharge of important administrative services. Thus special legislation brought to the city its full measure of abuses, and left its traces in administrative chaos and disorganization. The continuous appeal to the state legislature for amendatory legislation was checked by the Constitution of 1870, which provided for a general charter law for the cities of Illinois. Since the acceptance of the law in 1875, by the city of Chicago, a more systematic correlation of administrative functions and organs has resulted.

The history of the municipality of the Middle West has been characterized by rapid and transitory changes due to the presence of a mobile population and rapid material expansion. As

the western town-county system represents a distinct epoch in Anglo-American local administrative history, so the western city completes the thread of institutional continuity by appropriating the Eastern type derived from English models. Custom and early transitional forms have exerted but little force in the institutional evolution of the western city, while, on the other hand, the freedom of movement that has characterized western life has imparted its rapid and unqualified changes in the structure of the city.

Furthermore, the history of the American municipality brings into prominence one fact, that back of the vast variety of municipal legislation there appears no well defined theory of charter organization, which could be designated as general throughout the states. Crude workmanship, excessive legislative control, and the absence of a clear vision into the needs of urban life and organization, have resulted in a vast variety of forms of charter organization with few prevailing types. The process of development in Chicago and elsewhere has tended to draw the municipality from the traditional basis of local self-government toward submission to a strong control over the locality by the state legislature; this development has resulted moreover in a wider separation of the elements of executive and legislative power, in a more extended use of the suffrage in the city, and particularly in the election of the mayor by the people, and also in vesting him with the important powers of veto and appointment. The corporate history of Chicago affords ample proof of these changes.

CHAPTER II.

EARLY MUNICIPAL LEGISLATION IN ILLINOIS.

The ordinance of 1787 was not concerned with municipal institutions in the stricter sense. The creation of municipal institutions was reserved to the individual states carved out of the Old Northwest, when urban conditions arose. Chicago reflects not only the municipal development in the state of Illinois, but likewise the essential outlines of its quasi-municipal institutions. In its local administrative development the western state has preserved a curious and illogical mixture of rural and urban institutions operating within the same jurisdiction. Previous to the organization of the town of Chicago, the statutes of the state of Illinois preserved a pioneer act relating to village organization.¹ The historical value of this act lies in the fact that it was the first attempt in Illinois toward state regulation of village life through an orderly corporate existence. The act of 1814 was as simple as the village life which it was to regulate. It provided a brief and effective process by which the small village groups could assume the rights and immunities of corporate life. The county system prevailed at this period as the unit of local government in the territory. At its head stood the county court, a legislative and administrative body. It was made the agent of the legislature in the extension of municipal privileges to the village communities, and could vest any particular tract of land in a board of trustees, upon their application, for the purpose of establishing a village or town.

The villages were organized as proprietary institutions. They were, in their inception, close business corporations. The board of trustees occupied an intermediate position between the

¹ Act of December 19, 1814.

inhabitants and the owners of the village site. Rudimentary legislative and administrative powers resided with this body. The board, however, was more than the mere agent for the sale of lots; it possessed power to regulate the inner life of the village through the exercise of ordinance power. The membership of the board was determined by coöptation until the population counted fifteen freeholders, when the principle of the popular suffrage was to be substituted.

In these simple, rudimentary beginnings of the municipal life of the state are to be discerned the germs of subsequent development. The village was given its organic connection with the central territorial government through the county court, while with the village board resided all corporate powers, legislative and administrative.

A trading French population had followed the fur traders and missionaries into the Northwest from Canada, and planted along many streams and shores of lakes a mediaeval community, so characteristic of the French local life during that century. In Michigan, Indiana, Wisconsin and Illinois, at the period of territorial organization many of these villages possessed a flourishing and thrifty population living in the midst of common village holdings. The centralized administration in Paris touched with vigor the remotest of these village communities. The organization of territorial government found already in existence a rudimentary urban life, the outgrowth of special charters which had been granted previous to the act of 1814. The charter of the city of Vincennes may be taken as a fair type of the special legislation of this early period. A board type of organization prevailed, the board consisting of a chairman and nine assistants. The assistants were divided into three classes and each class was elected annually.¹ The board perfected its own organization by electing a chairman and clerk, and controlled the purchase of lands, markets, etc.² An important instance of

¹Ibid, Sec. 5.

²Act to incorporate borough of Vincennes, November 19, 1806. Secs. 3 and 4.

legislative control is found in the provision that all by-laws and money accounts, receipts and expenditures in detail must be presented to the territorial legislature.¹ The principles of organization employed in the special charters did not depart materially from those set forth in the general act of 1814. Simple conditions demand simple forms. These were found in the models of legislation which followed from the eastern commonwealths.

The state legislature did not attempt further general legislation with reference to the municipalities until the act of March 1, 1831. The act of 1831 was designed to extend the corporate powers of those villages already incorporated, which possessed at least 150 free-holders of twenty-one years of age. The initial step toward incorporation was a public meeting, organized with a president and clerk who remained as corporate officers until their regular successors were elected.² When the question of incorporation was decided in the affirmative, a second meeting of the voters elected a board of trustees which was to consist of five resident freeholders.³ The board determined its own organization by electing a president from its own membership.⁴

The president of the board of village trustees was a mayor in embryo, if measured by his relation to the board and to the administrative work of the village. Although possessing no positive powers other than those of a presiding officer, he naturally became the responsible head in the direction and supervision of the work of the board. The board organization implied the presence of dual factors, the president and its remaining members.⁵

The president and trustees were empowered "to make, ordain, establish and execute ordinances" in harmony with the con-

¹Ibid, Sec. 7.

²Act of March 1, 1831, Sec. 1.

³Ibid, Sec. 3.

⁴Ibid, Sec. 4.

⁵Ibid, Sec. 5.

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stitutional and legal enactments of the state.¹ The scope of the powers of the board were sufficiently ample to compass the simple village life of the period. The familiar category of village regulations appeared in the enumerated lists of the general act. Gambling and disorderly conduct were the subject of restraint and prohibition; shows were licensed, and markets established and regulated; wells were to be sunk for village water supply; streets and alleys were constructed and repaired by special assessments.² When necessity required, the board was authorized to organize a fire department.

The tenure of the board was fixed at one year, and all vacancies were to be filled by it.³ Full publicity was guaranteed to all the board sessions and all ordinances ordered published.⁴ Care was also taken to guard against unwarranted appropriations of public funds by the board, by limiting it to those purposes which came under its jurisdiction and control, and no others were considered as legitimate objects for appropriation; and further restriction was found in the required current accounting of all financial transactions with a maximum taxing limit of fifty cents on one hundred dollars.

The importance of this general act lies in the fact that the corporate life of the city of Chicago issued from its provisions. The special feature of the organization, which will appear more definitely as we proceed, is found in the relation of the president to the remaining members of the board.

It will be observed that the act of 1831 differed from that of 1814 in this slight but significant fact, that the board of 1831 was not a corporate body until its organization was perfected by the election of a president, when it was considered as composed of two factors; the president and trustees. In this we find the basis of the modern organs of mayor and council.

¹Ibid, Sec. 5.

²Ibid, Sec. 5.

³Ibid, Sec. 7.

⁴Ibid, Sec. 7.

CHAPTER III.

CHICAGO UNDER THE TOWN CHARTER.

The beginnings of great cities are generally clouded in myth and tradition. Those of the western continent have not been entirely liberated from the uncertainties of conjecture. The exact date of the settlement of Chicago does not concern us. It is significant, however, that the site of the city was a favorite fishing resort for the Indian, and was known to the fur trader as the lake station on the principal portage between the Great Lakes and the Mississippi system. Physiographically the military and portage village occupied a site of peculiar importance. The commercial supremacy¹ of the city, which dates its beginning from the construction of the Illinois and Michigan canal, which sought to utilize the natural advantages of this portage by connecting the two great water systems; and still later the Illinois railway systems directed the resources of the Mississippi valley to its markets. Out of this natural location grew an interesting controversy of some political and commercial importance with reference to the future city. It arose with admission of the state of Illinois in 1818, and assumed a more bitter form with the admission of Wisconsin in 1848. The ordinance of 1787 made provision for the formation of "one or two states in that part of said territory which lies north of an east and west line drawn through the southerly bend of Lake Michigan." With the petition for statehood on the part of Illinois Territory in 1818 came the proposition from her territorial representative that the northerly boundary line of the state be pushed north to 40° 30', instead of the southern point of Lake Michigan. A sweep of fifty miles of lake shore would fall to the new state. The argu-

¹*Executive Documents*, Vol. IV., 15 Cong., 2nd sess.

ment upon which the proposition was based was unique. Historically, the compact of 1787 had been broken when Indiana was admitted as a state. To secure a port of entry to the Great Lakes within the state was the desire of the territorial delegate. The argument was twofold: in the first place, it was assumed that great enterprises in internal improvements were confined to individual states, and the prospective connection of Lake Michigan with the Mississippi would be assured only in case the natural route came within the state. The second argument was based upon the first, and was the favorite argument of the period that lines of communication tended to stimulate and develop the spirit of nationalism.¹ The stress placed upon this consideration, in the light of the subsequent development of Chicago and the controversy arising with Wisconsin in 1848,² is best stated in the words of Judge Moses: "Had the line originally proposed (1818) by the committee been adopted, Chicago would not have grown into the imperial city she now is, because the building of the Michigan and Illinois canal and the Illinois Central railroad, which have contributed so largely to her progress and prosperity, and which were wholly the offspring of Illinois enterprise and statesmanship, would never have become accomplished facts."³ Whatever historic truth may be attached to these strong words of Judge Moses, it seems fair to assume that the prospective building of the canal and presence of the port have conditioned largely the early growth and development of the city, but the most significant factor in its growth is its position at the head of the Great Lake system, and further its position as the principal center of an area of vast extent and resources, which includes many states with their network of rivers bordering on the state of Illinois. It is in the obliteration of state lines, commercially, that we are to seek the cause of the growth of the industrial importance of the city of Chicago, and not alone in the 'accomplished facts' that the

¹Ford, *Illinois*, pp. 22-23.

²Sanford, *American Historical Association Report*, 1891.

³Moses, *Chicago*, p. 278.

Michigan and Illinois canal and the Illinois Central railway systems were the results, in origin and construction, of Illinois capital.¹ Chicago has been the natural gateway for the trade between the East and the West. It unites in a special manner the elements of a port for lake traffic. The metropolitanism of Chicago can not be explained by provincial arguments.

The manifest commercial spirit of the growing village found expression as early as December 4, 1829, in a request for a Congressional appropriation for the conversion of Chicago river into a harbor. The appropriation did not follow till 1833, when the liberal sum of \$25,000 was granted for the dredging of the river.² The canal commissioners caused a survey of the village and its division into lots in 1830.³ It was the first attempt to introduce system and order into village improvement. After 1830 the carrying trade of the Chicago port grew with great rapidity.⁴ The New England and New York stream of immigration had reached the Illinois and Wisconsin lands at this period.

The environs of Chicago were surveyed into government sections and county organization followed in 1823.⁵ The jurisdiction over the village was transferred from Fulton to Peoria county in 1825. In 1830, the Chicago precinct polled 31 votes within a radius of 21 miles, and the village proper possessed a population of 98. The rapidity of the influx of settlers from the east soon necessitated the reconstruction of county lines. The broad sweep of Peoria county was reduced on January 15, 1831, when the village of Chicago became the county seat of the newly organized county of Cook.⁶ In 1833,

¹Bross, *Chicago*, pp. 1-2.

²Dresbach, *Illinois*, p. 174.

³Blanchard, *Illinois*, p. 90.

⁴In 1831, four vessels discharged their cargoes, and in 1835 the number increased to 276.

⁵Blanchard, *Illinois*, p. 89; also, Andreas, *Chicago*, p. 147. The county tax levy in 1823 was \$11.42 upon personal property. In 1825 there were 14 dwellings and a tax list of \$79.72.

⁶Bennet, *Politics*, p. 26.

the village counted 350 inhabitants which was 200 more than was necessary to incorporate under the act of 1831, for the organization of villages.¹ An intense rivalry had sprung up among the lake cities for the control of the lake trade, and this rivalry stimulated and developed the commercial spirit of their citizens. If we examine the internal structure of the village before 1833, we are confronted with a mere accumulation of lots and venturesome speculators and frontiersmen, attracted by a prospective rise in land values which would inevitably follow with the completion of the canal. The administrative control of the county did not weigh heavily upon the village. There was a demand for concentration. Corporate life had become a necessity. This followed in August, 1833,² and on September 4, the town board had its first meeting and perfected its organization by the election of a president and a treasurer. The board soon appointed a street commissioner, tax collector and corporate counsel, while the offices of assessor and surveyor were united in one person.³ The town board was the repository of all powers, legislative and administrative. The president was a member of the board and possessed no independent powers, other than those delegated to a presiding officer. The territorial jurisdiction of the corporation did not include the lake front which was still possessed by the United States government. The limits were again extended in 1834. The population had rapidly increased from 350 in 1833, to 3,264 in 1835, and the town had suddenly become the center of a wild speculation in land and lots by the location of the government land office there in 1835.⁴ From 1835 to 1837 was the era of bogus or paper cities, and the traffic in lots with no corporate or prospective existence⁵ for the town. Chicago shared in this whirl-

¹Andreas, *Chicago*, I., p. 174.

²Bennet, *Politics*, p. 29.

³Andreas, *Chicago*, I., p. 175.

⁴The statistics of the office will illustrate the feeling of period. Its sales were in 1835, 370,000 acres; 1836, 202,000 acres; 1837, 15,000 acres. The office was discontinued in 1846.

⁵Davidson and Struvé, *History of Illinois*, p. 434.

wind of speculation. In 1830, lots sold at \$25 to \$100; in 1836-37 the prices ranged at as many thousands of dollars.¹

The simple privileges of the act of 1831 were not modified till 1835. With this act a series of special laws upon every conceivable urban subject were directed toward the city of Chicago, and it may well be said of the period that it has scarcely a parallel in the history of municipal legislation. Exorbitant claims were made upon the time and energy of the state legislature. The consideration of special laws crowded important business from the legislature, and filled its committee rooms with municipal lobbyists. It is readily conceded that the unprecedented growth of Chicago demanded summary treatment at the hands of legislative authority. Special legislation is further in harmony with the extreme statement of the principle that municipal problems are state problems, and as such are subject to detailed regulation on the part of the legislature.²

By the first amendment to the charter of 1833, the board of trustees was increased from five to nine.³ The powers of the board under the charter of 1833 were limited and were little more than those of supervision. By the amending act of 1835, it was given full power to manage the corporate real and personal property. The board was renewed annually with only freeholders as eligible electors. The powers of the board were greatly enlarged over the general administration of the town, and were in most respects commensurate with an expanding municipal life and included the main powers of internal control and regulation.⁴

¹*Chicago American*, August 15, 1835.

²*Chicago American*, January 31, 1837: "The interests of our town required a charter. The constant example of the Eastern cities will justify us in altering it at every session until it meets the wants of a large commercial town. However much we may have neglected our privileges under our charter, we certainly have availed ourselves of that of altering it at every session, until it has become like the old lady's stocking, 'darned so much that none of the original remains.'"

³Act of February 11, 1835.

⁴Act of 1835. Sec. 6.

The taxing power of the board was limited to one-half of one mill on assessed values for general municipal purposes, but the principle of special assessments was an early feature of the Chicago financial system. The principle of special assessments was applied to the raising of funds for the grading of streets and construction of sidewalks, but was modified by requiring a petition of two-thirds of the lot owners before constructions were begun.¹ The levying and collection of revenues and their expenditure are further modified by the peculiar physiographic features of the city, and show plainly how these influences may assert themselves in dividing the interests of a population which is otherwise compact. An examination of the map of Chicago will reveal the basis of this geographic division of the city into its natural districts.

At the period of incorporation as a town, Chicago was separated into two divisions by the Chicago river. The expansion of the city followed the canal to the west, until the two branches of the Chicago river furnished a third division. By the act of 1835, these three natural divisions afterwards known as the north, south and west divisions, were made the basis of the financial administration. The taxes of each division must be expended in the same district in which they were levied, thus creating a triple tax system within the corporate limits. These natural divisions have been prominent in the whole administrative history of Chicago, and have furnished a basis for the organization of the municipal machinery. This system has furnished the basis upon different occasions of an intense sectionalism, rivalry and jealousy.

The element of financial sectionalism was weakened by the election of the municipal officers on a general ticket. The administration of the city was conducted as a unit as far as the peculiar financial arrangement would permit. The administrative officers were appointed by the board of trustees by the charter of 1833, but the more important were made elective by the amending act of 1835.

¹Act of 1835. Sec. 7.

Special provisions were made for the organization of a fire department on the volunteer principle. These hook and ladder companies possessed the privilege of perfecting their own individual organizations, and had certain exemptions and privileges for their members.¹ By the act of 1831, the legislature had provided for the organization of such companies in all the towns and villages of the state. The town board made provision for a company in 1833. The office of fire warden was established in 1834 for each ward, and the town divided for such purposes into four wards. On November 4, 1835, the department was organized on the basis of the provisions of the act of February 11, 1835. The members of the board of trustees were ex-officio fire wardens.² These wardens were empowered to appoint a chief of the department, two assistants and additional wardens if necessary. Each house-holder was required to keep "one good, painted leathern firebucket" for the service.

Questions of revenue and expenditure made occasion for the act of 1836, which was essentially definitive and restrictive. The taxing power of the board was limited,³ but the rights of the city to the wharving privileges pertaining to certain portions of the frontage along Chicago river were defined by this act. The leases had been discretionary in their time limits, but were now fixed for five years.

We have recounted in a preceding paragraph the land and lot speculations which followed the location of the United States land office in the town of Chicago. The canal was nearing completion, and a sentiment was developing which had in view incorporation as a city. The board of trustees had begun certain municipal constructions, organized a fire department, inaugurated a system of water works under the auspices of the hydraulic company. The population of the town in 1835 was estimated at 3,265 persons while the territorial limits of the corporation had increased to an area of 2.55 square miles. In

¹Act of 1835. Sec. 13.

²Moses and Kirkland, *History of Chicago*.

³Act of January 15, 1836. Sec. 2.

the earlier part of the year 1836 the population had increased to 4,000, and likewise the rapid development of the material interests of the city necessitated an extension of corporate powers and privileges. These reasons furnished the basis of the agitation for a city charter.¹ On November 18, 1836, the trustees ordered that "the president invite the citizens of the three districts to meet in their respective districts and select three suitable persons to meet with the board of trustees on Thursday (November 24) and consult on the expediency of applying to the legislature of the state for a charter, and adopt a draft to accompany such application."² In pursuance to this order a call was made for the delegates of the three districts to meet with the board of trustees for the carrying out of the provisions of the order.³ The meeting was called for January 23, 1837.

The limited financial powers of the municipality under the charter of 1833 with the further restrictions of the act of 1836 were essential elements of weakness in the old charter. Financial limitations became then the principal question for consideration in the formation of the new municipal charter. The prevailing speculative atmosphere suggested an unrestricted use of the city's credit. An intense optimism in the city's future material development was the central fact of the business environment that prevailed. The power to create unlimited corporate debts found many supporters, but, fortunately, a wiser sentiment prevailed, and a maximum limit of indebtedness was fixed. The maximum limit of \$100,000 seemed ample for that early period.

It will be observed that the provisions of the laws and charters which formed the basis of the corporate life of Chicago from Feb. 11, 1833, to March 4, 1837, were as simple in their outlines as the requirements of a town engaged principally in the creation of homes and bank accounts, rather than in the

¹Bennet, *Politics and Politicians*, p. 34; *Chicago American*, January 21, 1837.

²Quoted by Andreas, *Chicago*, p. 176.

³*Chicago Tribune*, April 12, 1875.

outlining of elaborate programs for municipal government. The organization, in fact, was simpler than the conditions over which it presided. The board was supreme over the affairs of the town in legislation and administration. It contained the germ from which must later differentiate the parts of the present system. From this point will be traced the process of differentiation by which this original institutional organization—the board of trustees—has evolved into its related parts; it will be shown how the dignity and power of the mayor became more and more recognized in its relation to the council; it will be shown how certain functions of the latter became more prominent and emphatic and gradually assumed the role of administrative departments, working under the direction of the mayor; and how, lastly, the common council became the immediate successor of the board of trustees in matters purely legislative. In short, we are to trace the story of the municipal development of Chicago as a growth. This evolution has not always been continuous and direct; spasmodic changes, and frequent reversions to primitive forms have occurred, but still a product has resulted that is natural to the ceaseless, rapid change and unco-ordinated elements of sixty years of municipal life.

CHAPTER IV.

CHARTER ACT OF MARCH 4, 1837.

Two tendencies appear in the charter of 1837, viz.: the extended use of the suffrage in the increase of elective offices, and the tendency of the mayor and council to divide functions. The first tendency was in harmony with the doctrine of popular sovereignty, in its theoretic aspect, a product of the eighteenth century political philosophy; the second is an American product, the result of conditions peculiarly our own.

Beginning with the council as the basal germ, administrative necessity has carried the principle of division of labor into charter considerations. Chicago early made use of these two principles, but with a larger emphasis upon the suffrage than the principle of division of legislative and executive functions. The extended use of the suffrage begins with the town charter, in the election of the board of trustees and subsequently of other corporate officers who possessed discretionary powers and who were considered especial guardians of the municipal finances.

The town charter of 1833 prepared the way for the city charter of 1837; it was conceived in harmony with accepted principles of Eastern types. Chicago was still, however, in structure a rural community and administrative needs had not as yet enforced any considerable use of the principle of division of labor and little elaboration of administrative machinery had followed. Municipal interests must guide the gradual unfolding of corporate vitality. During the fourteen years of municipal life under the charter of 1837, special laws supplemented the errors of omission of previous legislation. These supplementary acts inaugurate the reign of quasi-municipal boards, in response to the pressure of new problems, and the assumption by the public administration of services which were in the beginning under the control of private administration. The violence of this unsys-

tematic legislation broke out madly under the charter of 1851, and its chaotic traces have been perpetuated in the charter law of 1872.

The principle of popular suffrage as the basis of the new charter of 1837 must first demand our attention. The elective principle was vital. But the traces of the privileged suffrage were still preserved. In fact the property qualification as a test generally prevailed throughout the states at this period. Unrestricted manhood suffrage did not prevail in the charter of 1837, but a property test was required. This restriction was not excessive, but sufficient to identify the suffrage with the interests of municipal expenditure. The charter seized upon the proper form of the property test by applying it through taxation. A nominal tax of three dollars paid within one year before the election entitled the resident to the privileges of the suffrage.¹ This restriction must be considered sensible and wise in the midst of a population of diverse elements, when a transient vote was proportionately large.

This property test was of short duration and was abolished in 1841, when the electorate was placed upon the basis of universal suffrage. As a corollary to a property suffrage the charter of 1837 required the governing body, the mayor, aldermen and assessors, to be freeholders, but this passed away with the removal of the property test for the suffrage.² Popular administration has been preserved and fostered in the American municipality to the exclusion of a trained service, by the extension of the suffrage to many offices which, in their nature, require previous preparation. A free and unrestricted use of the suffrage, which followed at this period continually emphasized the popular phases of administration.

The aldermanic body of the new régime, with the exception of the freehold qualification, preserved none of the outlines of the close corporation of the pre-revolutionary or colonial period

¹ Charter of 1837, Sec. 9.

² Act of March 1, 1841. Sec. 1.

of the American municipality. The aldermen were the lineal successors of the town trustees. The ward system was made the basis of representation in the council, and the state election system provided the basis for the selection of the aldermen, although the council was free to provide special rules and regulations. In 1841, the number of aldermen was increased from twelve to eighteen, and divided into two classes in order to preserve legislative continuity. This principle has been closely followed since that year. The ordinance power of the council was gradually expanded, making it commensurate with the growth of the administration.

It has been noted how the board of trustees of the town of Chicago became the aldermanic factor of the common council. The transition from the president of the old town board to the mayor of the city is no less interesting. Although there is no evidence of any conscious and direct attempt to create the office of mayor from the powers of a town president yet the transition is plainly marked. But the board of trustees of the town were instrumental in framing the charter of 1837, and preserved the outlines of the board as the basis of their work. The position of the president of the board was emphasized by the charter of 1837 to the degree of recognizing a different source of tenure, and by endowing the office with the dignity of the title of mayor. He was still, however, but little more than a presiding officer with few, if any, essentially independent powers. The fundamental point of departure was placing the mayor upon an elective basis and fixing his responsibility to the people. Administratively, his position was unimportant. The principle of checks and balances rescued the office from the complete monotony of the parliamentary procedure of a council sitting, by requiring his signature to all warrants drawn upon the corporate exchequer. His term was for one year, and at a salary of \$500. This immemorial custom of clothing the mayor with the ermine of a justice of peace has received but a wavering recognition in the organic laws of Chicago. While the char-

ter of 1837 made such provision by creating the mayor's court, the act of Feb. 15, 1839, abolished this tribunal, but retained for him the power of a justice; and by the act of March 16, 1847, the discharge of judicial functions by the mayor was made optional. It will be observed that the mayor's independence under the charter of 1837 was principally judicial, but an important fundamental change is apparent in the fact that he is no longer dependent upon the council for his tenure.

The mayor and aldermen were the constituent factors of the common council. Although all legislation proceeded from them in conjunction, the mayor was not a vital factor. He was only a presiding officer. He did not appoint the committees of the council. He possessed no veto power. It was an administration by the council. It was supreme in all essential matters. The old town board had perpetuated its own importance in framing the provisions of the new charter. It framed its own rules and exercised those powers over its members and organization usual to a legislative body. Those safeguards were absent, which are so universally employed in the modern American charter and which are generally so meaningless and ineffective in their practical results. Financial interests of the city officers, in contracts in which the city was a party, were legally put under the ban, but these interests were doubtless evaded at this time, as they have been generally evaded in Chicago and elsewhere in later years. The supreme position of the council in the charter of 1837 naturally gave it complete control of the municipal patronage. It elected annually a numerous array of administrative officers, who possessed more or less discretionary authority, subject finally to the will of the council. The act of 1847 introduced a sweeping change into the charter that affected mainly the source of tenure of the more important administrative officers. This was in accordance with the tendency already noted to increase the functions of the electorate. By this act the city attorney, city collector, treasurer and one police for each ward were made directly responsible to the electorate: a radical step toward popular administration. The unrestrained

control of the city patronage by the council received a further modification by limiting the right of removal to a two-thirds vote of its members, which removal could follow after the presentation of sufficient cause. The "natural divisions" were made the basis of the distribution of many of the corporate offices. The ordinance power of the council covered all the needs of administration. The powers of the municipality are essentially summarized in those of the common council. The charter prepared the way for a separation of administrative and legislative functions by removing the mayor from the control of the council in his tenure, but in the development of his power it did not radically follow out the division of powers at the time. The management and control of the municipal finances, the administration of the corporate property was given to the council. The ordinance power included the right "to make, establish, publish, alter, modify, amend, and repeal ordinances, regulations, rules and by-laws." This general and inclusive grant was defined by the application of the principle of enumeration of powers. The thirty-four specific counts of the charter may be grouped under the following heads. The council controlled and regulated:

1. All phases of crime, games and selling of liquor.
2. The granting of licenses for various purposes, a police and revenue provision.
3. Problems of health and sanitation.
4. The street traffic, public works, finances and revenue.
5. Protection of life and property through police and fire administration.
6. The duties and qualifications of corporate officers.

Although the discretionary control of the municipal finances was lodged with the common council, in order that adequate administrative checks might restrain that body in the levying and expenditure of funds, as well as to insure an orderly conduct of financial business, the charter made provision for a treasury department. The connecting link of the department with the council was established through its finance committee. An or-

der of payment must bear the proper signature and specify the purpose of the expenditure before it could be honored by the city treasurer, who was the head of the department and keeper of all the municipal funds and accountant of all receipts and expenditures. Full publicity of the departmental work was required through publication preceding the election of the council. The finance committee of the council exercised a vital control over the financial administration. It examined the assessment rolls of the assessor and brought its information to the notice of the council. The financial powers of the city received three important limitations through the charter of 1837:

1. The municipal levies could not exceed one-half of one per cent. upon all assessed real and personal property.

2. The borrowing powers of the council were fixed at \$100,000 per annum, as a maximum sum, to be applied to the liquidation of the municipal debt.

3. A further limitation appeared in the administration of the city funds. For all public improvements, directly local in their character, viz.: streets, drains, sewers, etc., the council was required to spend annually, in each ward, such proportion of these funds as would correspond with the amount of the assessed value of the property of the ward. The era of the "script" began with the financial administration under the charter of 1837, and ushered in financial disorders which became chronic in later years. These restraints outlined were necessarily crude, but were in harmony with all that the experience of the American municipality of that period had to offer in financial control. The proportionate expenditure of the city revenue for local purposes in each ward may lead to an equitable distribution of public moneys and suggest to the council the desirability of uniform development of certain interests, but administratively considered it has little to commend its retention. It is a kind of control that issues from the spirit of municipal sectionalism and ends in administrative disorganization. Physiographic features have presented peculiar conditions that have suggested and invited the use of this financial check by the city of Chicago, until the

local fund became a favorite one before the organization of the city under the general law of 1872. No sewerage or water system could be effectively constructed by such hard and fast methods of money distribution. During these first years of the financial administration of the city, the territorial expansion of the building area called for many improvements in streets and sanitation, until the revenues were sorely pressed and the taxing power of the council placed under severe demands.

The act of March 15, 1847, extended the principle of benefit assessment for public improvements so as partially to relieve this embarrassment. Fines of various kinds were resorted to for supplementary revenues. The collection of the state and local taxes has always been a county function in Illinois, but with the organization of the township system this service has been further decentralized. Before the inception of the township system, wherever municipalities had been organized they were permitted to do their own collecting within their territory. During the early years of the charter of 1837, the collectors were elected by the people, but were made appointive by the act of 1841.

An effective police administration in a city composed of adventurous elements is second only to a vigorous financial policy. No custodian of the police succeeded the military rule of the United States government and during the years 1833-35, the police functions were discharged by the city collector. The office of high constable was created in 1839, but was soon abolished and a nominal police force maintained. The gradual transition from a village to an urban system of administrative organization is best followed in the evolution of the police and fire departments. The council was the central organ of police supervision. The city marshal—a village survival—became the supervising agent of the Chicago police system by the act of February 27, 1841.¹ The administrative supervision exercised

¹This was made an executive department by the act of February 16, 1861. See Flinn, *History of Chicago Police*, p. 94.

through the office of the city marshal was supplemented by the police court. The simple system provided by the charter of 1837 proved inadequate for the severe tests of a rapidly growing western city. These provisions were in force as late as the police act of 1847, when the whole service was reorganized. The mayor has long been considered as the police agent of the state in the municipality. In accordance with this principle the mayor was made to share in police supervision although the council still retained its administrative control through its ordinance and appointing powers. The responsible active chief officer was the city marshal, and the direction and supervision of the whole service passed to the mayor. Another village survival of little meaning appeared in the provision that all members of the council should act as conservators of the peace within their wards. We can discern in the act of 1847 a gradual shift of police functions to the administrative officers with a tendency to vibrate towards the mayor as the possible responsible representative of administrative direction and supervision. This position was further strengthened through the establishment of a closer financial control over the police service by making the mayor an auditor of the police accounts. These meager grants of power to the mayor were significant steps. The legislation of this early period as well as that of later periods was in danger of becoming a mere accumulation to the exclusion of system.

In a city of wooden buildings an efficient fire service is scarcely less important than a virile police administration. The charter recognized the old village associations when it made the members of the council conservators of the peace, school commissioners and fire wardens. These are to be treated as village survivals. The fire department was provided for all villages of the state by the act of 1837. As early as 1832, a volunteer company had offered its services to the village of Chicago, but it was not until the year following its incorporation as a town that the board of trustees formally made provision for

the department. A fire warden was appointed in 1834 for each of the four wards. It was not, however, till November 4, 1835, that the fire department was given a chief, with two assistants. The department was organized upon a volunteer basis and the old formula, which human and administrative experience has found to be highly unsatisfactory, was fully recognized, viz.: that which is everybody's business is nobody's business. Responsibility was sacrificed in the organization of numerous volunteer companies which became a refuge for a thriftless class. These persons burdened the service, and immeasurably crippled its efficiency and threatened complete disorganization. The charter of 1837 and the amending act of February 13, 1839, strengthened somewhat central control, but did not disturb the volunteer basis. The department had gathered to itself so many chaotic elements that reorganization was thoroughly necessary. The act of 1847 designed especially to fix responsibility. The central features of the old system were retained with a more generous and absolute control over the personnel of the various companies by the chief of the service, who in turn was strictly accountable to the council. There was no fire service in the present sense. The history of the Chicago fire department presents a radically different phase of organization from that of the other departments. Its history is consolidation, rather than differentiation. It had its inception in extra municipal efforts often supported by private assistance and business interests, while a full municipal service was a gradual process.

The municipal assumption of the school administration presents a still different process. Previous to the charter of 1837, the public school system of Chicago was not under the control of the village authorities, but remained an integral part of the school township system. The act of 1835 created the system of school inspectors and placed the common schools in their charge. The township was divided into districts, and each elected annually three trustees who levied and collected the

taxes voted by the people, and employed the instructional force.¹ The charter of 1837 identified the school administration more closely with the municipality.² The early history of the organization of the school administration is one of transition from the school township to that of the municipality. It was consolidation of a different nature from that of the fire service. Consolidation had its initiative in the charter of 1837 by making each alderman ex-officio a school commissioner. The administrative interests of the municipality were thus largely emphasized in legislation. In connection with these beginnings in administrative consolidation, we are to consider that their meaning is weakened by the fact that the council did not control the school lands and fund, but all the taxes for school purposes were collected by the school township authorities and all warrants drawn by the council upon themselves as school commissioners.³ Confusion was the logical result of this treatment of the school administration by the charter of 1837. The schools were the battle ground of two sets of authorities, the one in control of the purse strings, and the other in the control of the direction of the schools, a curious anomaly of divided authority. The act of March 1, 1839, was designed to correct this confusion. The extra functions of school commissioners grafted upon the council was abolished, and the council given direct control of the school fund and empowered to levy taxes for school purposes. Under the preceding arrangement the inspectors and trustees were elected by the people, but the act of 1839 made them appointive by the council. This piece of

¹Johnston, *Schools of Chicago*, pp. 3, 6.

²In 1833, the school section was divided into 142 blocks and sold at auction for the consideration of \$39,619. This sale was made immediately preceding the rapid rise in city property, and thus lost to the schools of Chicago a material increase in the school fund. The school section represents today a value of more than \$100,000,000! See Johnston, *Schools of Chicago*, p. 3; and Kirkland, *Story of Chicago*, p. 154.

³Johnston, *Schools of Chicago*, p. 12.

legislation completed the process of consolidation by placing the council in control of the material resources of the school administration, as well as the appointment of the administrative service.

The elements which were to build the different administrative departments were rapidly organizing. The police, fire, and school administrations were well started on their way towards definiteness and system. Those elements which were to form the department of public works had not approached such definiteness. The charter of 1839 provided a street commissioner, but the different services were scattered. They received their effective treatment by the charter of 1851. A board of health, composed of the members of the council, was created by the charter of 1837.

The organization of the administration under the charter of 1837 was an elaborated expression of the tendencies started during the four years under the town charter of 1833. A town charter was clothed with the dignity of a city charter. In so far as the principle of division of powers had begun to operate it had followed by stress of administrative business, rather than in response to any conscious attempt to apply a principle. The mayor was little more than a presiding officer of the council; a dignity rather than a positive factor in the administration. If he possessed influence at all, it was because of his personality. The administrative officers were in no way responsible to the mayor, but were compelled to look to the council for credentials, directions and criticism. The omnipotence of the town board was assured by the new council. Governmental and political powers compatible with a local body crowded its grant of privileges. Its control over the administration was expressed in the direct responsibility of the whole official régime to the council, not only by appointment, but in the strictest directions over its details. The principle of popular sovereignty was in force, but little recognition given to the separation of powers. In many respects the amendments

to the charter of 1837 were more far reaching than the charter itself, although its outlines were followed. A process of decentralization in functions, rather than in the control, marked these series of supplementary acts.

Administrative consolidation and differentiation were gradually being asserted. While the mayor received only incidental attention the elements of executive control were gradually building. The charter of 1837 was the government of the council.

CHAPTER V.

PERIOD OF LEGISLATIVE AND EXECUTIVE DIFFERENTIATION.

Eighteen years of corporate life had run their course since Chicago was a village, and fourteen years, since full municipal privileges and immunities had been conferred. The period of the most rapid change had not yet been ushered in. It was the formative period when the forces and elements were gathering and tendencies starting, which were to work their greatest transformations under succeeding charters. Rapid and marked changes begin with the charter of 1851. Special laws and enactments for Chicago crowded the statute books of the state and encroached upon the legislative energy of the state legislature to such a degree that it logically resulted in the city of Chicago formulating its own legislation and receiving the formal sanction of the state. This accumulation of special laws forced periodic revision. The charter of 1851 was little more than a codification of that previous legislation, that had been passed for the government of the city of Chicago. Economic, social and political forces shape the nature and structure of administrative organization. The degree of correspondence between these forces and the administrative institutions furnishes the fundamental basis of a vital and efficient administration, and constructs a correct perspective for subsequent development. For the exactness with which these principles of administrative organization are reflected in the Chicago of this period, the charter of 1851 must answer. The organic law was a well ordered and digested one, considered in the light of the technique of character construction.

Not only did the rapidly expanding municipal life threaten to break uncontrolled from the legal restraints of an inadequate

charter, but its territorial limits were crowded. These were extended by the charter of February 14, 1851, but the division into nine wards was retained. The federal government had retained possession of the lake shore, but relinquished its right to this land in 1854.

Localism was quite marked under the charter of 1851, and furnished a conscious basis for the organization of the administrative service. Upon this basis of local interests, the more important municipal officers may be divided into three groups:

1. Those officers whose duties extend to the whole city.
2. Those who represented the three natural divisions (street commissioner and assessors).
3. A class appointed to act within, or represent the various wards.

The elective offices of the first group were quite extended, and included the mayor, city marshal, treasurer, collector, surveyor, attorney, chief and two assistant engineers, while each ward elected two aldermen, a police constable, and each division a street commissioner and other officers. This whole list was elected annually, with the exception that the council was divided into two classes.

A noticeable feature of the charter of 1851 was its more liberal attitude toward the mayor. The tendency to enlarge the executive power outlined in the previous charter, was strengthened by the one under consideration. He was made responsible for the proper enforcement of the laws of the state and the ordinances of the council. He must "devote as much of his time to the duties of his office as an efficient and faithful discharge of these duties may require." His growing importance is suggested by the fact that he was required to give information, from time to time, to the council and recommend such measures for its consideration as the demands of the administration might require. He was no longer a perfunctory signing officer, but the important weapon of the veto made him a factor to be reckoned with in municipal legislation. Although all ordinances and resolutions of the council must re-

ceive his sanction, it must be observed that his veto power amounted to a mere delay in legislation, a reconsideration of the measure, since it required only a majority vote to pass the measure over his veto. His salary was increased from \$500 to \$1,200 per annum. Any vacancy occurring in the office of mayor was filled by the council from its own membership. The "acting mayor" possessed the full power of the regularly elected mayor. The omnipotence of the common council passed with the charter of 1851.

The constitution of the common council remained unchanged and its general character was outlined in language similar to that of the charter of 1837. To the thirty-four specific counts of this charter were added thirty-one, which indicates the extended scope of municipal legislation and points to a complicated municipal life. It must not be inferred from the previous observation upon the position of the mayor that the council had been so weakened in its former position as to destroy its ascendancy over the administration. It was still supreme in final authority. An examination of the specific powers of the council will reveal the fact that they were principally regulative. The license was fast becoming a favorite instrument for the purpose of police regulation and of supplementary revenue.

There is nothing in the organization of the council under this charter that is not in harmony with the modern municipal legislative body. There is one point, however, that must be noticed in reference to the previous charter. The committee system has assumed some importance in the work and organization of the council. Under the charter of 1837 the committees were elected by the council, but the charter under consideration transferred their appointment to the mayor.¹ The importance of this change is inherent in the nature of the committee system of the modern legislative body. Heretofore, the mayor has been a silent factor in the council, but with the appointment of its committees he became at once a controlling

¹ Rule of Council, No. 33.

element in shaping the policies of legislation. The appointment of the eight standing committees effectively reënforced the veto power. These eight standing committees possessed more power than the ordinary committee of the council and performed quasi-administrative functions. The degree of legislative differentiation is indicated by the presence of the eighteen committees whose membership varied from three to seven.

The charter of 1837 gave the council full control over the municipal patronage. For twenty years this power remained undisturbed except in minor and exceptional offices. The charter of 1851 opened the way for executive control of the civil service in the interest of effective administration. It provides for the removal of certain officials by the mayor or marshal for cause and by the consent of a two-thirds vote of the council. During the first years of the charter, the mayor was strenuously guarded from participating in the appointment of the administrative service. The patronage was rapidly becoming an important factor. The act of Feb. 14, 1857, was a tribute to executive power. By it the mayor came in possession of the appointment of the important executive officers with the approval of the council. In the treatment of the municipal civil service, Chicago was now in line with the national tradition and experience. This change came as a result of previous financial and administrative disorders, particularly in the treasury department. To secure executive responsibility was obviously the controlling motive, and this could only be accomplished by a more definite separation of legislative and executive functions. While in the beginning the mayor was confined in his appointment to the chief discretionary officer of the treasury department, it was a recognition, however slight, that the head of the department should be primarily responsible to the mayor as the embodiment of executive powers, and his responsibility, if any, to the council should be secondary. It was the first important recognition of the personal responsibility of the mayor in the administration. It completed the overthrow of the complete domination of the

council, and clothed the mayor with a power which, in after years, was destined to make him one of the worst victims of the spoils system known to municipal history. Conditions were now favorable for a rapid concentration of executive power. Executive concentration has never been complete in the American municipality. The principle of checks and balances has prevented this, but has operated to clothe the executive with power in a system where the council previously enjoyed full and unrestrained authority.

Historically, executive concentration and administrative control have begun with the financial administration, and Chicago offers no exception to this generalization. The treasury was the first administrative department to be organized. It has, moreover, been a single commissioner department from the first, although under the charter of 1837 the treasurer was made and has since remained an elective officer. He possessed no discretionary powers in outlining a financial policy. The charter of 1851 was directed toward better financial accounting, and was the first attempt to fix financial responsibility. The most important powers of the corporation touched the question of taxation. Associated with the usual per cent. limitation upon the amounts to be raised upon assessed values, there was the further one of limited amounts that could be levied for specific purposes. In the first place a contingent fund for general expenses was created through a three and one-half mill tax upon real and personal property, and was designed as a basis of expenditure for current administration. A second fund of two mills was established for school purposes, and a third of one-half mill for the interest on the bonded debt. Certain other special funds were provided for occasional objects of expenditure that covered a variety of items. The spirit of localism of the previous charter animated the financial administration of the present one. The three natural divisions were made tax districts for the levying and expending of certain funds, while three-fourths of specified taxes must be expended within the districts taxed. A peculiar and interest-

ing feature of the financial administration of this period related to physiographic influences. The charter implied two classes of expenditure, viz.: those objects of a general nature, and those of a local significance. In order that the inequalities of expenditure for the second class might be prevented, a system of equalization was provided so that when all local expenditures were not proportional to the tax contributions of any district, the council was authorized to increase or decrease its taxes for the succeeding year until the proper balance was struck. A special levy of one-tenth of one per cent. within any division for any purpose made optional with the council further emphasized the financial localism. Special assessments were largely employed in the construction of public works, and a desire for a more equitable adjustment of these assessments resulted in the creation of a board of commissioners, for the purpose of assessment supervision. The division of the revenue into funds so generally employed by the charter of 1851, obviously, had two objects in view: first as a check upon the taxing power of the municipality and second for purposes of financial accounting and security. It grew out of the financial disorders of the previous charter. The fund system was made more pliable by permitting the clerk to unite two or more funds that affected the whole city; or they could be united in any division upon the designation of their character.¹ By the act of February 28, 1854, the administration of special assessments received a specific review. The office of superintendent of special assessments was created and given full charge of all such levies. The importance of the act of 1857 has been noted in another connection. It was one of those pieces of legislation that bears the leaven of organization in the midst of disorganization. By it, the financial system assumed the dignity of an administrative department. The outlines of the new department were obviously sketched from those found in the national and commonwealth systems of financial organization. This was the first departmental organization for the city. Its outlines have remained

¹Act of February 14, 1853.

essentially unchanged. It is furthermore significant that this first executive department should be organized upon the lines of concentration. The comptroller was a discretionary head of the department. It is an important fact that discretionary powers in certain financial matters passed to the department. The control of the department extended to the general management of the various municipal funds, and what is far more essential, to the inspection and revision of the accounts of the other branches of the administrative service. A serious and palpable error in the previous financial operations had permitted the expenditure of funds before specific appropriations had been made by the council. The correction of this loose method of expenditure was a decisive step in the direction of financial control. It was further strengthened by relieving those officers concerned with public construction from the formation of contract. The treasury department was brought into close relations with the mayor by the right to appoint the comptroller. This officer was in a position of influence in the financial transactions of the city. He had the collection and disbursement of the revenues, and was the fiscal agent of the city in making loans and contracts. His supervision extends to all subjects which related to city finances, revenues and property. The connection of the department with the common council was established through a system of detailed statements of estimates of the various branches of the city service. The annual appropriations were made upon this report. The council passed upon all warrants honored by the treasury, through its financial committee. For some time after the organization of the city government in 1837, the official service of the treasury department was an unsystematic body of clerks of the council, but the more important were made elective in 1847, and remained undisturbed in their position until 1857, when the treasury department was created with the comptroller at its head.

We have explained the enlargement of the power of the council over the schools in 1837, and the creation of a board of inspectors in 1841, and that their excessive demands upon the

city treasury for funds for building purposes led to a curtailment of their powers in 1846 until they occupied a position of mere agents of the council. The charter of 1851 retained the old board of inspectors with additional provisions for three school trustees of each school district within the city. The fiscal matters of the school administration were turned over to the newly created functionary—the school agent. The charter of 1851, therefore, stands for system in the school administration as well as in the financial. A system founded upon the coördinate responsibility of three distinct authorities, viz.: school agent, inspectors and trustees. The organizing vigor of the act of 1857 affected the school system. The council had created the office of superintendent of schools in 1853. He was concerned with the instructional phase of the school work. The fifteen inspectors provided by the act of 1847 had exercised general administrative control under the direction of the council. The act of 1857 organized these inspectors into a board of education. It was made a perpetual body by dividing its members into three classes of five each; one class was renewed annually. With organic directness matters were further simplified by abolishing the trustees of the school districts. The council appointed the board. The administrative significance of the school board lies in the fact that it is the first important use of the board type in the Chicago system. Two important departments of the city administration, education and finance, were organized under the charter of 1851, by the use of the two representative types of administrative organization, the board and single-commissioner methods. Conditions prevailed favorable for the board type, which gradually asserted itself throughout the administrative service, with the exception of the financial department.

The volunteer basis of the fire administration was perpetuated by the charter of 1851. The council remained in undisputed control over the appointment of the service as well as the organization and government of the companies. It prescribed fire limits for wooden buildings.

The health administration received its first independent organization under this charter. The board type of organization was employed, the three commissioners were appointed by the council, and the organization of the board was perfected by the presence of the mayor ex-officio as its chairman. This established the personal relation of the mayor with the administrative work of the board. The board was empowered to control, in a general way, all matters pertaining to health and sanitation, but its administrative independence was not complete.

The public works department had its organic beginning by the act of February 15, 1851. This was not the charter act of 1851. It was not made an executive department till a later period. The act of 1851 created a quasi-municipal corporation for the specific purpose of water-supply, with only nominal administrative control on the part of the city. The Chicago Hydraulic Company was organized as a quasi-municipal authority with a board of three commissioners in general charge. The board could employ the credit of the city to the amount of \$250,000 but must account for such loans to the proper authorities. All water assessments, collections, and constructions were under their direction. The financial security of the board was guarded by providing for the investment of all surplus in excess of \$500 in stocks, or upon real or personal securities approved by the judge of the Cook county circuit court. The commissioners could not be interested parties in any contract and were removable by the court upon petition of the common council showing malfeasance in office. This act did not meet all requirements and soon received important modifications which were largely in the form of checks upon the action of the board. The act of February 28, 1854, made the board elective and continuous by electing one member each year, while the act of February 15, 1855, permitted a division of duties among its members. The same act made the council a party to the consent to issue bonds, and limited their amount to \$300,000. A more careful system of accounting was introduced and made subordinate to the finance committee of the

council. The force of these financial arrangements was to establish a closer administrative control over the board than that instituted by the act of 1851. It bore the impress of administrative unity.

Analogous to the act which incorporated the Hydraulic Company in 1851, was that which created the board of sewerage commissioners. The "natural divisions" were here utilized for the purpose of board organization. The board was in the beginning appointed by the council, but by the act of February 14, 1855, the voters of each division elected one commissioner who should be a freeholder and a resident of the district. The board was given ample control over the drainage of the city and was empowered to employ such scientific help as the service might require. The natural divisions were organized as three sewerage districts, with the central control lodged with the sewerage commissioners. A financial control, similar to that exercised by the council over the water commissioners, was maintained over the sewerage board. The bonded debt was apportioned to each district and a sinking fund created for discharge of these bonds. The members were removable upon petition of a majority of the city council to the Cook county court, or without further procedure by a two-thirds vote of the council. In its administrative capacity the board enjoyed considerable freedom, but found its principal checks in financial provisions and the possibility of charges that might be preferred for the mismanagement of public business.

The charter of 1851 and its amending enactments were fundamentally organic. Consolidation and differentiation were carried further than at any other period of the same years. The activity of the mayor was extended, but was still conditioned by the action of the council. The changes that followed with the amendments to the charter of 1851, intensified administrative organization. These are among the most important acts given to Chicago. The act of 1857 marked especially an era of change when it ushered in a series of definitely organized

administrative services. The particular feature of these acts that strengthened the personal relation of the mayor with the work of administration must be reckoned as of fundamental importance. Administrative organization was moving toward a vantage point where the personality of some directing power could unify and supervise. The vigor of organization was everywhere manifest. While new services were demanding and receiving proper organic recognition, old ones were being clothed with the dignity and power becoming their importance and their work. All this emphasized the degree of separation of legislative and executive functions. There was a more even balancing of the power of the mayor and council. The council was now a legislative body.

CHAPTER VI.

CLOSING PERIOD OF SPECIAL LEGISLATION
FOR CHICAGO.

Special legislation for a great and growing municipality means periodic revision. In legislative revision temporary and organic acts are held of the same importance. Principles are sacrificed to the treatment of details. So this summary form of special legislation had not always conduced to the symmetry and harmony of the administrative development of Chicago. To guide and direct this development, to bring definiteness out of confusion, system from accumulation, were the primary reasons for successive charter revision, supplemented by ordinances of the common council.¹ This was the plea for the charter of 1863. The act of February 14, 1857, laid the foundations for this charter.

The relations of the mayor and council remained essentially the same. The veto power of the mayor was qualified by the right of the council to reconsider and pass the measure over his disapproval by a two-thirds vote. His appointing power received a severe check by transferring the appointment of important officers to the council.² On the other hand his administrative functions were emphasized on the lines laid down by the amending act of February 14, 1857.³ While the council was now more properly a legislative body, it still participated in administrative business.

There is no well defined principle employed by this charter to determine which officers shall be appointed or which shall be elected. The elective list had been constantly extended

¹Mayor's Inaugural, May 5, 1862.

²*Council Proceedings*, May, 1865.

³Mayor's Inaugural, May 3, 1865.

until it included the mayor, aldermen, city attorney, treasurer, collector, chief of police, chief and first and second assistants of the fire department, certain constables, and commissioners of public works. There seems to be no definite reason for selecting certain officers of this elective list and excluding others. Again an analysis of the appointive list reveals the same confusion. The mayor and council both participated in this privilege which at once indicated the absence of a uniform plan for the renewal of the civil service. In the previous charter, the mayor had been dealt with more generously in respect to his appointing power. A comparison of the powers and duties of the corporate officers under the charters of 1851 and 1863 reveals little essential change. This was a period of elaboration in the administrative system.

The fiscal demands of the city required a constant extension of the machinery of the treasury department, which resulted in a larger use of the system of checks and balances in control of the independent financial transactions of individual officers of other departments. The fiscal affairs of the various departments were now centered in the treasury department. No change was made in its structure, but a more careful system of auditing and accounting strengthened its efficiency. A committee of general supervision over the city funds was composed of the mayor and the finance committee of the council. Its decision upon all disputed points was final, unless the council intervened. The principal of financial checks was not confined to the treasury department alone, but the council was required to employ system in its annual appropriation bills. The comptroller was required to submit an annual estimate for the fiscal year, and no appropriation could follow except upon a specific statement presented by this estimate. On the other hand, no items of expenditure could be increased except for public improvements under certain conditions. System in taxation was likewise a commendable feature of this charter. The taxing power of the municipality has never been adequate to meet the demands of the administra-

tion. Although excessive at times, and doubtless crippling in their results, the restraints upon the taxing power have, on the whole, been wisely instituted. Enforced economy and carefulness has resulted in the use of system. These restrictions will appear more clearly in the detailed statement: The council could levy an annual tax of not more than:

1. Four and one-half mills on assessed valuation of real and personal property to defray the contingent and other city expenses. The receipts from this source constituted a general fund.

2. Two mills for school purposes.

3. Two mills for the department of police.

4. One mill for the reform school.

5. Two mills for street lighting.

6. A sufficient tax to meet interest on the sewerage debt and to provide a sinking fund for the liquidation of the debt and sewerage repair.

7. A tax sufficient for the interest on bonded and water debt.

8. Two and one-half mills for a permanent improvement fund, which required a vote of a majority of all aldermen.

9. A tax sufficient to defray any debt contracted during the preceding year.

Restrictions on the taxing power in the form of exact per cents. are not sufficiently pliable to accomplish the purpose for which they are designed. A restraint upon lavish and unwarranted expenditure on the part of the municipal authorities can be more effectively secured by the creation of some central board of control than by the hard and fast limitation of statutory per cents. An equitable assessment and an economical collection of taxes are not enviable achievements in the administrative history of Chicago. The fruits of an ill devised system have perpetuated their kind into the present time, leaving unwholesome traces in inadequate revenues and a crippled administration, as well as in acts of corruption of the most open and compromising nature.

By the act of March 3, 1867, it was sought to correct this looseness by a system of co-ordination and concentration through the creation of the office of tax commissioner to be named by the mayor, while the council appointed one collector from each district.¹ The assessors were organized into a board that had general control of assessments under the direction and supervision of the treasury department.² The amelioration of the unsanitary condition of the city required more extensive financial powers than the corporation then possessed. The financial administration under the charter of 1863 was efficient and energetic when measured by the almost insurmountable obstacles that beset the territorial and material development of the city. The fund system prevailed as a basis of economic and proportionate distribution of revenues. A point in illustration is afforded by the public works department. The fund system had split the stream of revenue into numerous branches. The general fund was a nucleus fund around which clustered the more special ones.

The administrative departments remained unchanged in their organization. This board type of administrative organization had found gradual recognition in all branches of the service. The board of public works had been created upon this basis; so the police, health, school, fire, and tax administrations. The public works, police, fire and financial departments bore the severest strain of the municipal work of this period. Preceding the charter of 1863, the growth of the city had been rapid, but during this period its expansion in area, wealth and population was phenomenal. Sand dunes were gradually covered with a forest of wooden buildings, which brought menaces of fire and unsanitary areas. The mixed population that crowded into the city on its way to the Mississippi valley demanded a police vigilance of more than ordinary watchfulness and severity. The public works department was compelled to grapple with the

¹*Council Proceedings*, February, 1867.

²*Ibid.*, January 20, 1865.

improvement of a widely extended territory with limited financial resources. These difficulties were in a measure lessened, but, by act of 1867, a closer scrutiny was established over the financial transactions of the board. All services of public construction were subordinated to the board and considerable power was given it in the formation of contracts in the construction of public works.

The police department remained as organized by the police act of 1861. The city was first divided into police precincts in 1863. The fire and health administration was directly under the supervision of the police board. The superintendents of the police and fire service were responsible to the board. By the act of February 16, 1865, the health administration was given a separate and independent organization and was later placed upon a board basis, with the appointment of the members completely removed from the municipality and lodged with the judges of the superior court. The motive for this isolation is not quite apparent, unless it be to escape the uncertainties of political tests and popular judgment. While the board type organization prevailed, the source of tenure was not uniform. The elective principle had been used at the sacrifice of both the council and the mayor. The mayor was given a personal relation with the various boards in an official capacity, but this relation was later severed with some of the more important ones.

With the charter of 1863 and its amendments, closes the era of special legislation for the city of Chicago. Two events had occurred at the beginning of the seventies that made the charter of 1863 and its successor of peculiar importance, not only to the municipal history of Chicago, but to the state and country at large. One was sealed in disaster and destruction; the other conceived in order and construction. The one had reduced the outward city, reared in so short a period under so many difficulties, to ruins and ashes, and from these ruined homes and business hopes was created the Chicago of to-day;

the other event laid the foundation of a new municipal régime in the former provisions of a general organic law for the municipalities of the state. The treatment of these epoch-making events for the city of Chicago will be reserved for another place; but the significance of the state constitutional convention of 1870 to the charter of 1863 should be noted here. The convention placed the municipalities in the category of those subjects that could no longer be regulated through special legislation. Chicago was then suddenly severed from all hope of special treatment by the state legislature, and it became only a question of a few years when it must accept the provisions of a law in common with the smallest rural city of the state. In this connection it should be noted that the new institutional life of Chicago began with its material renaissance. The charter of 1863 ends an epoch in the institutional and material development of the city, which is separated from the present by a chasm darkened by the ruins of the conflagration of 1871, and by the institutional transformations that followed the acceptance of the general municipal law of 1872. These events close an epoch of less than forty years, fraught with the momentous problems and struggles of a city favored in location, but menaced with multitudes of changing and shifting humanity. As we glance back over the institutional development of these years we may follow certain lines of perspective at times drawn with the unmistakable directness of order and system, while in other years they are dimmed with indecision and confusion. It must be observed that each charter and revision is linked by no uncertainties with its predecessor. In the closing years of the old municipal régime, we must search for the degree of administrative differentiation that ended with the charter of 1863. From the simplest institutional beginning, issued an elaborate and complicated system. The board of trustees, with its slight aristocratic traces of the colonial period of American municipal development, was the one governing body. It was the repository of all corporate power. Administrative necessity

produced a division of labor and created administrative departments for specific branches of the service. Differentiation upon the one hand, and consolidation upon the other, have marked the institutional history of Chicago, and have made it typical of the evolution of the American municipality. Gradually, the mayor assumed dignity and position as the personal embodiment of executive power, while the council was restrained more particularly in its legislative duties. This separation was not complete. The council was the essential fact of the administration. The administrative departments, with the exception of the treasury department, were organized according to the board type. The physiography of the city was an unmistakable factor in determining the structure of certain departments, and this led to the development of a localism often bitter, and cherished until broken down by the growth of a larger municipal consciousness. The board type of departmental organization in its representative phase was easily adapted to the presence of the natural divisions of the city. Although a spirit of consolidation had been working throughout this period, yet Chicago was not free from its era of conflicting boards. Characteristically true of municipal history at large, those boards brought their season of chaos and of patchwork systems,¹ until the administration proved unequal to the tasks imposed upon it. The hope of relief in special legislation had proved no remedy at all.² It produced, on the other hand, a municipal lobby too often prompted by other motives than a symmetrical institutional development.³ Each new piece of legislation bore the promise of order and system which were too often shattered before the tests and rigors of administration. The hope of better administration was crushed in the confusion of changing institutions; in their weak efforts to correspond to new conditions. Administratively, innovation should bear the credentials of experience and reason-

¹Report of Council, December 3, 1866.

²*Council Proceedings*, September 25, 1866.

³*Chicago Times*, April 8, 1872.

able correspondence to historical elements and existing environment. The first period of institutional history, then, closed amid material disaster of the great fire, which has proved the beginning of a grander era in the history of the city. With characteristic energy, upon material ruins has been fashioned a splendid realization of the possibilities and opportunities inherent in the location of the city and the temperament of its people. In this material renaissance, institutional development has been sadly neglected. No such architectural skill has been employed upon the municipal institutions as has been lavished upon those business palaces and fairer homes which fringe its lake shores and spacious boulevards.

PART II.

PRESENT ADMINISTRATIVE ORGANIZATION OF CHICAGO

CHAPTER VII.

RE-INCORPORATION UNDER THE CHARTER LAW OF 1872.

The constitutional convention of 1870, for the state of Illinois, declared against special legislation for the municipalities of the state.¹ This provision enforced upon the state legislature a task it was little prepared to meet. Few states had broken away from the practice of special legislation in the regulation of their municipal life. But few general laws were in operation, and special legislation had left a patch-work system of many years of accumulation, from which must be shaped a general organic law that would satisfy the varied wants and needs of many municipalities. The general law received executive approval April 10, 1872. The status of the incorporated cities was not disturbed by the presence of this legislation, which was framed especially for those localities which would assume the responsibilities of a municipality, and ultimately for all cities of the state.² The city of Chicago was organized nine years under the charter of 1863, and the amending act of 1867. A constantly growing complexity in the increased social and economic structure of the city had demanded more frequent revisions in its organic law. Extraordinary conditions prevailed in Chicago at the time of the formulation of the act of 1872. A destroyed city necessitated a more liberal charter of financial

¹Constitution of 1870, Art. IV., 22.

²Chi. P. & P. & Co. v. Chicago, 88 Ill., 224.

powers before the adequate means for re-construction could be secured. Two years, however, passed before any serious discussion was begun for a change of charter. This agitation soon revealed a positive and decided opposition to the general law of 1872. Although expressing minority views, the influence of the opposition was vital and important. The main argument of the opposition is found in the structure of the general law, fashioned from a multitude of rural, village elements, gathered from the municipal life of the state, many of which were foreign to metropolitan conditions. It was urged that Chicago was unique and exceptional in its growth, and demanded an especial and exceptional treatment at the hands of the legislature. Three distinct currents of feeling found embodiment in more or less definite propositions upon this question of the future structure of the city government. The Civic League took a position of extreme conservatism and opposed the law of 1872 and the substitute act of 1875, and urged the maintenance of the present status of government until more generous legislation could be secured.

An organized movement of some strength found expression in an act of exceptional interest, avowedly designed for Chicago, although framed according to constitutional provisions requiring a general law for the whole state. It was framed in Chicago and supported at Springfield by a strong Chicago constituency. The friends of the substitute bill hoped to secure its passage by the legislature, and its acceptance by the people, before the friends of the general law of 1872 could induce incorporation under its provisions.¹ The substitute act received executive approval April 8, 1875, only five days before the city voted to incorporate under the law of 1872, and thus the lobbyists, fresh from the legislature, wasted their energies in a fruitless attempt to defeat incorporation under the above law. Two hopes, however, stimulated the opposition to persist in its efforts: first, to defeat incorporation under the law of 1872;

¹ *Council Proceedings*, March 15, 1872.

and, second, if the people accepted that law, to create conditions that would compel its rejection by the courts. Both methods were employed and both signally failed.

Although the substitute act of 1875 was never accepted by the people of Chicago, its direct connection with the re-incorporation of the city compels an outline of its principal features. In its structure, the act differed radically from the law of 1872, as well as from the charters of the previous years for the city of Chicago. The unicameral legislature had been persistently maintained throughout the municipal history of the city. The law of 1875 proposed the bicameral legislature, composed of a board of councillors and a board of aldermen. These chambers were to be distinct and separate, copying faithfully the outlines of our national and commonwealth legislatures. Fifteen aldermen were to constitute the upper branch, to be elected upon a general ticket with no restriction of residence; while the lower house was to be composed of three aldermen from each ward. Each body possessed a concurrent and negative vote upon all matters of legislation, with one exception, which was in full harmony with accepted modern legislative precedents; all important appropriation bills, and all ordinances imposing a tax, were to originate with the board of aldermen, but through the power of amendment the board of councillors were enabled to effect radical changes. A still more radical feature appeared in the form of a mayor's cabinet. The council's power was to be shattered in the "checks and balances" of a bicameral system, and in an institution of cunning structure in the form of the mayor's cabinet. This completes an exact copy of the federal system.¹ The constituent factors of the cabinet were to be the heads of the administrative departments and the principal corporate officers. The cabinet incorporated many elements of

¹"It is believed that no charter for a great city ever received more earnest, careful, laborious and studious attention than that which grew into the Charter of 1875." Franklin MacVeagh, in Report of Citizens Association for 1874-76, p. 21.

strength, if properly restricted in its power. The opposition engendered against this system is founded upon a wrong theory of its relation to the other organs of the municipality. Consultation is the essential purpose of the cabinet. The law of 1875 proposed to endow that body, not only with powers of advice upon the current administration, to offer and to suggest measures for the promotion of the general interests of the city, but with the power of contract for all sums above five hundred dollars. The dangers of the cabinet idea appeared in this proposition. The formation of contract is an executive function and is almost universally lodged with the mayor, or certain heads of departments, but the memories of the Tweed ring of New York city were still vivid, and they at once clouded the cabinet feature in an atmosphere of suspicion. The cabinet was to be constituted so as to merge individual and collective responsibility. The safe-guard proposed to prevent the cabinet from becoming the basis of a "ring" appeared in the restrictions upon the re-election of its members. The concentration of political patronage made it still more an object of odium.¹ The city council aroused in its own defense, recorded its emphatic objection to the substitute measure by a vote of 32 to 3.² Popular disapproval in the form of mass meetings attempted to arouse a sentiment that would secure its defeat in the legislature, but proved of little avail, unless it was to crystallize public opinion in favor of the law of 1872. The law of 1872 was a tribute to the common council, while the substitute act of 1875 was constructed in the interest of executive concentration. It was significantly pointed out that while the mayor was powerless to prevent and to correct abuses under the act of 1872, there was still compensation in the fact that he would be as powerless to foster and to promote elements of disorganization in the interest of personal aggrandizement.³ The substitute act

¹*Chicago Tribune*, March 16, 1875.

²*Ibid.*

³*Chicago Times*, March 18, 1875.

created an irresponsible mayor, shielded by an irresponsible cabinet.

These three distinct propositions were open to the people of Chicago: to continue the municipality under the provisions of the patchwork charter of 1863, with its inadequate delegation of powers, or to cast their lot with either the law of 1872, or the law of 1875. Conditions demanded a more liberal charter. The two measures open to immediate acceptance represented radical differences upon the question of executive and legislative concentration. The relative merits of the two systems became the central point of discussion in the campaign before the city. The arguments were concrete and apropos to the plans under consideration. The supporters of the substitute measure pointed out the dangers that would surround the council should it be given unlimited control on the one hand, over the municipal patronage through the appointment, the creation, and the abolition of offices, and on the other hand, over taxation and the voting of the budget, combining, in a confused manner, legislative and executive functions. Furthermore, the common council of the American municipality did not present an unimpeachable record, a fact which was attributed to its unrestricted powers. It was contended with much justice that the law of 1872 had purposely sacrificed the mayor in the exaltation of the common council.¹ The elimination of the principles of checks and balances made way for a legislative despotism, unrestrained except by its own discretion. In words clearly prophetic, it was intimated that the position of the common council made possible sweeping abuses, and converted the councillor's seat into a glittering prize.² However, it was contended that a record of many years of concentration of power in the common council had been fairly characterized by honesty and economy. On the other hand, the structure of the city government outlined by the law of 1875 presented an untried experiment in the field

¹*Chicago Tribune*, April 26, 1875.

²*Chicago Tribune*, April 27, 1875.

of municipal legislation, while especial opprobrium was attached to the mayor's cabinet. The framers of the law of 1872 had designedly enlarged the functions of the council in the hope of attracting to it a better talent and wider experience.¹

April 23, 1875, was the day appointed for the submission of the organic law of 1872 to the people of Chicago. At the same election the people were called to pass upon the important question of minority representation. For reasons, both patent and concealed, the election notices made no mention of minority representation, which doubtless contributed to its defeat by the people. There was also general indifference manifested by the citizens upon the whole question of incorporation.² The character of the opposition and the feelings of the council point to palpable and intended omission as the most effective method of defeating the measure,³ while on the other hand, it was claimed that the measure was defeated but counted in.⁴

The friends of the substitute act of 1875 at once began quo warranto proceedings against the city on the grounds that the election had been irregular and illegal through the neglect of the council to insert the clause for minority representation as required by the incorporating clause of the act. The lower courts sustained the demurrer and gave judgment of ouster.⁵ The corporation appealed to the supreme court of the state, which reversed the decision of the lower court on the ground that an election for the adoption of a city charter could not be invalidated by quo warranto proceedings, and further that the

¹Mayor's message, *Council Proceedings*, July 1, 1872.

²The following table of votes will indicate the civic interest upon these questions, as compared with the vote upon one of the principal municipal officers. *Council Proceedings*, April 14, 1875.

	Aff.	Neg.	Total.
Incorporation	11,714	10,281	21,995
Minority Representation	1,550	5,554	7,104
City clerk in 1876			50,822

³*Council Proceedings*, May 12, 1875.

⁴Report of Citizens Association, 1874-76, p. 21.

⁵Chicago vs. People, 80 Ill., 499; also, *Council Proceedings*, May 3, 1875.

omission of the call to vote on minority representation did not invalidate the choice to re-incorporate under the act of 1872.¹

This decision of the supreme court of the state closes the career of the municipality of Chicago under the régime of special legislation.² The internal development of the city during this later period must be largely sought in the ordinances and regulations of the common council, as they issue from the general provisions of the act of 1872 and subsequent amending laws of the state legislature.³ The council began a new lease of life as the central fact of the new charter.⁴ Thus the principles of the charter of 1837 were recognized.

¹Chicago vs. People, 80 Ill., 497.

²Potwin vs. Johnson, 108 Ill., 73. But recent decisions of the supreme court have practically reversed its former rulings, and annulled the constitutional provisions for general legislation, by holding that a law, passed for cities of 50,000 and more, was general in the meaning of the constitution. The law was sustained on the ground that it was uniform in operation upon all persons and subject matter in like situation: *Cummings vs. Chicago*, 144 Ill., 563. In a letter dated Jan. 27, 1898, Judge M. F. Tuley writes: "Necessity appears to have demanded a radical repeal of the limitations [upon special legislation]. I see now no barrier to a flood of local laws for Chicago."

³Guild vs. Bross, 101 Ill., 478.

⁴Law of April 10, 1872, Art. III; also, *King vs. Chicago*, 111 Ill., 68.

CHAPTER VIII.

THE COMMON COUNCIL.

The municipal history of Chicago has emphasized at least one fact, viz.: the supremacy of the common council during more than half a century of municipal activity. In the development of the council is crowded much that is essential to the corporate history of the city. The general law of 1872 records a triumph of the council. It is the special recipient of all delegated functions, and, broadly speaking, exercises all powers not conferred upon other organs. It is endowed with a creative force inherent in legislative bodies, and is explicitly given the right to re-delegate those powers contained within its charter.

Although the separation of executive and legislative functions, and the recognition of their separate spheres have become well established, yet these relations are by necessity close and mutual.¹

The council is the creative organ in the elaboration of the internal institutions of the city under the fundamental provisions of the charter law of 1872.² The mayor is the responsible agent in the enforcement of its will. In the composition and structure of the council is epitomized its life history. The dual factors of the charter of 1837 remain as the structural elements of the present council. For all legislative purposes the aldermen are the principal factors, while the mayor assumes the position of its parliamentary leader, with no power in legislation, except

¹ Mayor's Message for 1893. "Corporate authorities of Chicago are the Mayor and the Common Council. Broadly defined their fields are separate. But their relations and duties are closer than indicated by the line usually drawn. They so interweave and blend that they are practically one."

² Crook vs. Peope, 106 Ill., 242.

to cast a tie vote.¹ Although the mayor is a legal factor in the council, his position has been gradually reduced to that of a presiding officer.² His executive functions are sufficiently exacting to demand a release from this useless relation to the council.³ Unity in legislation and administration is the main argument that sustains the relation of the mayor to the council. Administratively this argument has little basis in its practical results, which could be realized by a more effective relation than the discharge of the routine business of a presiding officer. Viewed from a legislative standpoint, upon last analysis the aldermanic element is the common council.

The ward system of representation for the election of the aldermen has always prevailed in Chicago. The law of 1872 provides a choice of two methods for the election of the council, either a majority or a minority representation. The latter plan was rejected at the time of the adoption of the present law, both through the neglect of the council in making the proper publication of the election notices, and through public indifference.⁴

The plan of minority representation proposed by the act of 1872 was outlined from the provisions of a similar law for the lower house of the state legislature. The object of this plan is two-fold: in the first place it enlarges the territorial basis of representation, and in the second place it permits the representation of minority parties in the council. The enlargement of the territorial basis of representation is a step towards the destruction of the narrowness of the ward system, which easily permits the division of the voting population upon lines determined by peculiar residence conditions. It will be observed, that, upon final analysis, the ward system divides the voting population into social and economic groups upon a narrow territorial

¹ Carrolton vs. Clark, 21 App., 74.

² King vs. Chicago, 21 App., 74

³ Mayor's message for 1893.

⁴ Chicago vs. People, 80 Ill., 496.

basis, preventing the organization of public opinion upon broader principles of interest in its relation to the city as a whole. The tendency of this system is to localize representation, to create small representative areas and to draw lines within the council that emphasizes the ward relation of social and economic forces within the city in their most antagonistic form. Crime and poverty group themselves in unfavorable quarters, while the well-to-do seek the more desirable portions of the city. This simple but fundamental fact increases the dangers surrounding the ward system of representation. These divisional interests clash in the council. The politician follows the path of greatest interest, and while party differences are ultimately determined by economic and social laws, these are seriously perverted by a system of representation which prevails in Chicago. The choice of men of talent by this system is necessarily restricted to individuals who dwell within a narrow territory. While minority representation has not resulted in all that its advocates have desired, it is at least a step towards the elimination of those disturbing factors which have enslaved our city councils, and despoiled them of much of their efficiency and usefulness, and have emphasized the worst features of our party system. Although minority representation was defeated in 1875, it is still open as a possible basis for representation in the council. The plan provided by the original law of 1872 has been materially modified.¹ The charter law provides for a special referendum, and if once rejected there was no provision for again submitting the question to the people. This defect has been remedied.²

A certain latitude of choice is open to the council in fixing the ratio of representation, should the minority plan be adopted. The law proposes the districting of the city on the basis of a ratio determined by dividing the whole population by a number from two to six. The plan proposed is the "three cornered

¹ Law of April 11, 1883.

² Ibid.

system," with the cumulative method of voting. Each district selects three representatives, and the voting is so arranged as to permit of the "plumping" of votes upon any candidate. Each voter is entitled to as many votes as there are representatives from his district to be elected.

The experience of the state at large in the use of the cumulative plan is that it has not yielded the results its friends had promised.¹ The beneficial results that might accrue from the adoption of this plan for Chicago would doubtless be weakened by excessive party organization. The uncertainties of party strength makes the manipulation of the party vote a series of guesses, and consequently leads to the supremacy of the party boss. The limited number of persons from each district destroys the possibility of a large field of choice for candidates. The final result in practice would seem to indicate that not only do minority parties go unrepresented, but that the uncertainty of party strength leads to excessive "plumping" and consequent loss of voting energy. The adoption of this plan would only prove a shiftless palliation for the real remedy. There is then little possibility of the adoption of a plan that the friends of representative reform can fully support, although the people of Chicago are great sufferers under the present system.

The failure of the citizens to accept the provision for minority representation threw the council upon the immemorial ward basis, with its narrow localization of forces to be represented. The ward system was evolved from simple conditions that gave full recognition to the territorial basis of economic and social interests. But those conditions have changed with the complexity of urban life. Political habit prevents the destruction of an obstacle that obstructs the use of rational forms of representation, that seeks to encourage the grouping of interests upon a broader basis than that of mere locality. The law of 1872 provided a numerical basis of classification for the municipalities of

¹Summarized by Commons, *Proportional Representation*, p. 93.

the state, and fixed a maximum limit of 36 aldermen in all cities of over 100,000 inhabitants.¹

This restriction has, however, been modified by later legislation.² The maximum number of 48 aldermen was fixed for all cities of 350,000 inhabitants, with the provision that, with any addition of territory, there shall be added to the council two aldermen for every 25,000 inhabitants, and two for every fraction of more than 15,000 persons.³

While this law affects the whole state, it was ostensibly passed for the city of Chicago, in order to bring the council into proper relation to the extensive territorial additions that were made at that time. When the city has grown in population so as to entitle it to a representation of seventy, it shall be divided into a maximum number of 35 wards.⁴ Chicago has reached the limit. This legislation enabled Chicago to escape the limitation of the original law, and provided it with a council of sufficient size for purposes of representation and legislation. The city is divided into one-half as many wards as there are aldermen,⁵ and shall be of "compact and contiguous" territory. In the hands of the modern legislator, the above words have a varied meaning, and have been given a liberal interpretation by the aldermen of Chicago. The council is a continuous body, which is not however in theoretic harmony with a representative government, but it preserves more closely legislative unity, and insures administrative continuity. The details of the mu-

¹Law of June 4, 1889. Charter III., 2. The general scheme is presented in the following table:

Population.	Aldermen.
Cities not exceeding 3,000.....	6
Cities, 3,000 to 5,000.....	8
Cities, 5,001 to 10,000.....	10
Cities, 10,001 to 30,000.....	14
Cities, over 30,000, for every 20,000 inhabitants.....	2

²Law of June 4, 1889.

³Law of June 4, 1889.

⁴Ibid.

⁵Law of June 17, 1887.

nicipal elections are governed by the general election laws of the state. The presence of the township system in the corporate territory connects closely the municipal election with the local elections of the state.¹ The Australian ballot system has received full recognition, and in its general features is in harmony with the legislation of other states that have adopted ballot reform.² The restrictions upon the electorate are so unessential as not to affect, materially, universal manhood suffrage. On the other hand, the conditions of naturalization are so easily complied with that they have introduced into the body of the electorate a large untrained foreign vote, which becomes an easy subject upon which to exercise the party whip. The nature and character of the common council is determined largely by the method of nominations.

The problem of the primary is yet unsolved.³ In Chicago the abuses of nominations become a menace to good government. Representative government stands defeated before the rule of the unfit, with all the accessories of ward politics. The result is a complete travesty upon democracy. Any party desiring to enroll its candidates upon the ballot must possess a polling strength of two per cent. of the entire vote cast at the preceding election. This restriction upon the freedom of party formation operates to restrain reform movements. The state legislature seems either unwilling or incapable of correcting this wrong by direct legislation, and this feeling is supported by general public indifference. The registration act of June 18, 1891, is designed to prevent "repeating."

The conditions which affect the return of aldermen to the common council are these: a narrow territorial district, a ma-

¹ The city council formerly acted as canvassing board. New legislation places this with the canvassing board, consisting of county judge, city attorney and election commissioner. *Council Proceedings*, April 12, 1886.

² Law of January 22, 1891.

³ The special session of the state legislature of 1898 provided for a system of nominations. See Appendix.

jority vote composed of a large suffrage, of every shade of national and political faith and tradition, the discipline of excessive party organization, badly protected primaries, but with fairly effective methods of voting through the requirements of registration, and through the use of the Australian ballot. This presents a natural, logical chain. The council cannot rise above its source: in the absence of proper regulation the source of representation often becomes excessively polluted.

The aldermanic standard of Chicago is essentially political popularity. Any class of nominees may be returned. There is little restraint upon the return of the worst candidates. That all men are eligible to official position is a fundamental proposition of democracy. The qualifications of aldermen fixed by law are so general that there is practically no exclusion. Certain business relations operate to exclude persons from the council, as an interest in contracts, and direct purchase of city bonds.¹ He must never have been convicted of a crime, bribery or corrupt practices.² The council decides all matters pertaining to aldermanic qualifications.³

High official standards are not created by legislative enactments, but issue from the moral relations of the community. The standard of business integrity will be the ultimate factor in fixing and determining the nature of the public service.⁴

The charter law imposes but few restrictions upon the council in the details of its own organization. The mayor is the presiding officer, but the rules of procedure of the council determine finally the character of its organization. The courts have held that the charter requirement of the presence of a majority of the members of the council for a business quorum cannot be defeated by the legislative absurdity of refusing to vote when present, and that a majority of members will make any business

¹ *Sherlock vs. Winnetta*, 68 Ill., 530.

² *Hilrett vs. Heath*, 1 App., 609.

³ *Keating vs. Slack*, 116 Ill., 191; also, *Council Proceedings* April 12, 1886.

⁴ *Launtz vs. People*, 113 Ill., 142.

valid although they refuse to vote.¹ Furthermore, the individual responsibility of the aldermen is emphasized by a required ye and nay vote upon all ordinances and propositions creating a municipal liability or making an appropriation. City property cannot be alienated except by a two-thirds vote, while a majority vote carries the sanction of a permit to use the streets for railway purposes.² In order to rescind an act of the council as many members must be present at the second consideration as at the time of its original passage, but this provision does not prevent the council from ratifying an act of a prior meeting.³

An analysis of the specific powers of the council presents many difficulties. The general law of 1872 bears the impress of a compilation. The cities of the state yielded to the law all that was peculiar to their administrative experience. But in the special charter of 1863 for Chicago must be sought the main source of the powers granted to the council by the law of 1872. The position of Chicago demanded from the framers of the law an extensive grant of powers to the council, in order to meet the demands of administration in a large city. In this way was established an intimate connection with the special charter of 1863. The council is the central organ of administration under the provisions of the present law, which was particularly true before special legislation came to reconstruct the scattered elements of the mayor's power. The corporate activity of the city is fairly summarized in the substantial delegation of power to the common council. The council is the source of institutional development and its specific grants are widened by the addition of implied powers; but the legal obligation of the city must be sought in this charter.⁴

The powers lodged with the other organs of the city are de-

¹ *Commiss. vs. Baumgartner*, 41 Ill., 255.

² *Ch., D. & C. Co. vs. Garrity*, 115 Ill., 161; also, *St. L., A. and T. H. R. R. Co. vs. Belleville*, 25 App., 580.

³ *Schawneetown vs. Baker*, 85 Ill., 563.

⁴ *Trustees vs. McConnell*, 12 Ill., 138.

pendent upon the action of the council for any vital influence they may exert upon the administration.¹ The ninety-six charter grants of power to the council are not vested rights, but subject to repeal or amendment according to the fundamental proposition that the municipality is created by the state for administrative purposes.² The municipality represents the interests of the people, and holds in trust the administrative powers conferred upon it, which must be exercised through the council by appropriate ordinances.³ This decisively implies that the council is the source of administrative legislation within the limits of the power and jurisdiction of the charter.

The analysis of the scope and purpose of the ordinance as the recording instrument of the council's will on the one hand should reveal the nature of legislative procedure, and, on the other hand, should draw the line between executive and legislative functions. But on the contrary little attempt is made to employ a principle in determining structure and subject matter of the city ordinance. It assumes four forms: 1. The ordinance as a legislative enactment. 2. An order. 3. A resolution. 4. An appropriation bill.

If these ordinances could be made to contain certain specific subject matter, and receive legislative treatment according to their form and nature, municipal legislation would be characterized by more definiteness. The ordinance in its legislative use is broad, creative, organic, and is properly concerned with problems of a general nature which touch the whole municipal life.

The order is likewise organic, but more specific in its scope. Its function is special.

The instruction approaches the order in its general nature, but more properly is an instrument of executive will and control in the regulation of the details of administration.

The resolution mainly expresses an opinion on a particular

¹After April 1, 1898, the salary of the aldermen are fixed at \$1,500.

²*Mt. Carmel vs. Wabash Co.*, 70 Ill., 69.

³*Zanone vs. Mound C.*, 103 Ill., 555; also, *Chicago vs. Wright*, 69 Ill., 318.

subject, without commanding action that would lead to administrative change.

The appropriation bill has in Chicago that special and favored place that it everywhere holds in the category of legislative enactments. It must be prepared in a definite manner, before a stated time receive special consideration by the council, subject to a special veto, passed once during the fiscal year, and before a stated time. The nature of the administration of the budget is minutely determined by the council. The appropriation ordinance of Chicago is subject to the above processes. Supplementary budgets may be voted only under extraordinary conditions and must receive the sanction of a popular approval, through a referendum. The interests of economy and financial responsibility have demanded this special treatment by the council; but this treatment does not distinguish Chicago from the legislative bodies of the modern city or state. This procedure in financial legislation has logically followed with the growth of legislative sovereignty. The policy and course in legislation are in the hands of committees which present their reports and information generally in the form of ordinances. These committees suggest a natural, but somewhat crude, classification and grouping of legislative materials. A detailed statement of the powers of the council must be sought in the charter.¹

A sufficient survey of the content of aldermanic power in Chicago may be obtained from the following broad classification. The most important legislative power of the council is financial. The activity, efficiency and vitality of the municipal government are conditioned by a well-ordered and vigorous financial policy and administration. The central question of a modern charter resolves itself into this: With which organ is lodged the essential element of financial control? The executive or legislative concentration of power is concerned ultimately with this question. The growth of representative government

¹ Charter law of April 10, 1872, V, Sec. 1.

has universally recorded one answer. The once exclusive control exercised by the executive over the finances of the state in all its divisions, has been shattered by the advance of popular government. In financial control rests the power of the modern legislature. The purse strings of Chicago from the inception of corporate life have been securely taut in the hands of the common council; but this control has received its restrictions and limitations by constitutional provisions and through legislative enactments and inadequate assessments. The fundamental nature of the financial position of the council is at once revealed in the grant of exclusive control over the finances and property of the corporation. The council sanctions all expenditures, which are of two classes: current expenses and debt liquidation. It controls the revenue and taps its varied sources. The control imposed by the state upon the council in the exercise of its borrowing and taxing powers means in practice little vital control. No system of financial administration has a right to exist whose presence is a constant menace to official honesty and to the morals of the community. At this point, confusion and chaos enter the financial administration of the city. The financial powers of the council are essentially those of revenue. The corporation is evidently restricted in the acquisition of property for purposes of revenue.

This brief survey of the financial position of the council emphasizes the original proposition that the municipal legislature is supreme over the financial administration of the municipality, except in the assessment and collection of taxes. If its ordinance power was concerned with no more extensive matters, this control alone would be sufficiently comprehensive to regulate the entire city administration.

The police ordinance power of the council in the regulation of business interests is necessarily extensive. In its broadest sense police power is governmental.¹ Private rights must submit to its dictates. The municipality exercises this function as

¹*American and English Encyclopedia of Law*, Article on Police.

a delegated power of the commonwealth in the interest of public health, good business and general welfare. The difficulty of an exact definition of police power has led the United States supreme court to avoid it, and to restrict its interpretation to specific cases.¹ Police power is based upon discrimination.²

The license power of the council is closely connected with its exercise of police functions. It is essentially regulative in its character.

Theoretically, the mayor represents the police power of the state within the jurisdiction of the municipality; practically, the council controls the ultimate exercise of these functions, except in extraordinary circumstances when the police power becomes military in its nature and scope. In the ordinary course of the police administration the ordinance power of the council is both regulative and prohibitive over those agencies that threaten the moral, economic and social welfare of the community. Police power is primarily restrictive and preventative; but the effective exercise of this power often assumes a regulative character. All the possible exigencies of police power in the regulation of the varied interests of a metropolitan life are fully provided in Chicago by charter grants. The suppression of disintegrating forces that poison the moral atmosphere of the community does not alone absorb the full attention of the police power, but it is also concerned with the protection of the social and economic interests as well.

In close relation with the exercise of police functions stands the license power of the council. Essentially it becomes an instrument of police regulation, and incidentally a source of revenue. The license ordinance imposes specific restrictions upon certain businesses. The constitution imposes no restrictions upon the council, but these reside in the nature of the problems and conditions to be controlled. Although in theory the police power is one of legislative delegation, yet in the creation of administrative institutions it rests with the council to make free

¹Stone vs. Mississippi, 101 U. S., 814.

²Chicago vs. Case, 126 Ill., 282.

use of its implied powers. In the consideration of the specific objects of the license it will appear later that its essential nature has been perverted as an instrument of police regulation, and that it has been extensively employed as a gatherer of municipal revenues.

A radically different set of powers, which pertain to public construction, has fallen to the council. This phase of administration absorbs a large measure of the municipal activity and is closely connected with the creation of municipal revenue. The general outlines of the policy of municipal construction is found in the ordinances of the council. The task imposed upon the council is reflected in a system of public works, reconstructed upon the ruins of the great fire of 1871. The work carried on by the city and the park boards, in the midst of discouraging conditions approaches in extent the brilliant transformations of Paris, or the labored and studied street expansion of Berlin and other cities of the continent. Peculiar physical conditions and bad administrative methods have imposed civic burdens upon Chicago, that few municipalities have been called upon to meet. In the expenditure of the millions of revenue required to put into operation this costly system of public works, it is not strange that suggestions of misappropriations of funds should be associated with the council. The council possesses full control over all construction, and the regulation of those works which are carried on by private parties for quasi-public purposes.

An ordinance power of great importance, and one of recent legislative discussion, is concerned with the granting of municipal franchises. This power of the council has long been subjected to a popular referendum.

It lies within the power of the council to permit, to regulate or to prohibit the location, construction or laying of tracks in the streets of the city for a period not to exceed twenty years. The popular veto takes the form of a petition which represents one-half of the abutting property owners of the street. The absence of proper restraints and the feelings of indifference on

the part of the council have deprived the city of the just participation in valuable franchises, which would supplement in an important manner the ordinary revenues. The nature of the petition reduces the popular referendum to a mere matter of form, and makes it of little consequence as a restraint. The position of the council toward the revenue phases of the franchise has no defense. Mistaken judgment will not condone it. The want of shrewd business ability upon the part of the council will not explain away the loss of important revenues. The burden of proof for its adopted policy upon the question of franchises falls heavily upon the council. Its wholesale voting away of valuable and just rights has done much to discredit before the people the institution that should stand as the preserver of their privileges and interests. The council has started, on the one hand, tendencies of the first magnitude, and it has crystallized them in law, while, on the other hand, they are protected by that keen business ability, which the private corporations in Chicago can command.

These facts summarize the essential ordinance power of the council, although a variety of subjects still augment and emphasize the supreme position of the municipal legislative over other phases of the city administration. These miscellaneous acts are not always purely legislative, but often encroach upon the executive functions. The law of 1872 left the common council in a freer control over the internal organization of the city. The charter provided in each case the outlines of departmental organization, but left to the council the elaboration of the administrative machinery. The grants of the charter are effectively supported by a provision of implied powers which enables the council to issue any ordinance necessary to supplement its specific delegation. This provision practically removes all restraint within the territorial jurisdiction of the corporation, and permits the council the full exercise of its ordinance power. This examination of the grants to the common council empha-

¹See Appendix.

sizes the fact that this body is the repository of all the essential powers of the corporation. It touches and controls all administrative details; institutes municipal policies; opens up sources of revenue and directs streams of expenditure. The council has ever been, and is the central fact in the municipal system, although the growth of executive concentration has modified its former absolute position.

CHAPTER IX.

THE MAYOR AND HIS FUNCTIONS.

The organic law of April 10, 1872, was virtually silent upon the subject of the mayor. His functions were largely prescribed by the common council. Two facts serve to explain this attitude of the law of 1872 toward the chief executive of the city: In the first place it was designed for newly organized cities and for those that chose to re-incorporate under its provisions; and in the second place, special legislation existed for all the mayors of the state. A tentative measure of two years' limitation was passed at the same session of the legislature that gave to the state the general municipal law of 1872.¹ Hence upon March 9, 1874, this two years' experimentation with uniform legislation for the mayors of the state came to a close by the limitation of the statute itself, and the cities were thus suddenly despoiled of all effective mayoral powers. Chicago had not yet accepted the law of 1872, but still operated under the charter of 1863. The common council of Chicago developed strong and bitter hostility to the re-enactment of the "Mayors' Bill" of March 9, 1872.² It recorded its emphatic rejection of the measure by a vote of 34 to 2.³ It was a struggle between the friends of the executive and the council. The defeat of "this most obnoxious law" for Chicago meant the

¹Law of March 9, 1872.

²The council of Chicago has always jealously guarded its own interests and power. This has not always assumed the form of unselfish motive to further the interests of the corporation, but rather to protect the council as an institution for the exercise of personal power and influence.

³*Council Proceedings*, 1873. The words of the resolution reflect most strongly the feeling of the council: "We are unalterably opposed to the enactment of any law which shall continue in operation for one second that pestiferous relic of the Medillian era, the 'Mayors' Bill.'"

return of the council to its former control over the civil service and the mayor to a more limited form of the veto as provided by the charter of 1863. The friends of the council system succeeded in defeating the re-enactment of the "Mayors' Bill," which expired March 9, 1874. At the time of the adoption of the general law of 1872 by the city of Chicago, a modified form of the "Mayors' Bill" was re-enacted by the state legislature.¹ It has been elsewhere noted that the municipal law of April 10, 1872, was a tribute to the council by making it the depository of all powers. Two facts appear in the clause of acceptance, that explain the presence of these two separate legislative enactments.

The "Mayors' Bill" of April 10, 1875, was supplementary to the general law of April 8, 1872. It was a partial re-enactment of the "Mayors' Bill" of March 9, 1872, and plainly bears the impress of the resolutions of the council upon the question of the restriction of executive power.

The appointing power of the mayor remained unchanged but certain restrictions upon his power of removal and veto were imposed. By the provisions of the former act, the mayor's power to remove officers of his own appointment was only restricted by the presentation of a written statement of his reasons for removal; while the appointing power under the modified act of 1875 was materially weakened by requiring the consent of the council, which could in time prevent a removal through a two-thirds vote. The veto was subject to the same restriction.² The friends of legislative concentration scored a triumph over the mayor by imposing a standing challenge to the unrestrained exercise of his privileges upon matters of removal and veto. If executive concentration was sought by this act, it defeated its purpose by the above provision, and introduced at once the principle of "checks and balances" which virtually transferred the power to the council.

¹Law of March 9, 1872.

²Law of April 10, 1875.

The power of the council to prevent the mayor from removing those officers, who would endanger the unity and harmony of administration, has long been held incompatible with executive responsibility and administrative efficiency. The discretionary officers responsible for the shaping of policies should be accountable either to the council or to the mayor, and not to both organs. The mayor's bill of April 10, 1875, remained in force until May 28, 1879, when its repeal destroyed the basis of the mayor's power in Chicago, and forced him back upon the limited grants of the organic law of 1872, and upon the still more meager concessions of a triumphant and reluctant council. During the process of the re-organization of the administrative departments, after 1875, the appointing power of the mayor received constant change, and especially was this true of those departments changed from the board to the single commissioners system. The first years of the new council were employed in the elimination of the board system from the departmental administration. The mayor was the creature of the council in this period of the destruction of boards and the creation of new officers. The charter right conferred upon the council the power to create new officers, and to stipulate the manner of their appointment.¹ These ordinances were an important source of the mayor's power, and after 1875 must be employed more largely in the interpretation of his place in the administrative system. Before the repeal of the act of April 10, 1875, the question of the right of the mayor to veto all acts of the council was raised, upon the technical construction of the word "order." The corporation counsel held that the veto power extended to all ordinances, resolutions and orders of the council which were in content the same and only varied in form.²

¹*Council Proceedings*, June 17, 1878.

²*Council Proceedings*, November 19, 1872. The same opinion also held that the mayor's bill of April 10, 1875, did not repeal all of the grants of the charter of 1863, was only a supplementary act and that this charter was still in force and was not repealed by the charter law of

Shortly before the repeal of the provisions of the act of April 10, 1875, the question of the interpretation of the mayor's veto over the appropriation bills was raised by his veto of the entire budget for the fiscal year of 1879.¹

The amending act of May 28, 1879, repealed section 1 of the mayor's bill of April 10, 1875. This was not due, obviously, to any direct hostility to any power of the mayor, but in order to make it a part of the general municipal law of the state.

This brief survey of the more important legislation concerning the mayor reveals to us an interesting struggle between those persons, on the one hand, who sought to concentrate responsible power with the mayor, and those, on the other hand, who struggled to place this power in the body of the council. By these series of acts the mayor was clothed with dignity and power, and in particular instances he was given a dangerous control over certain vital questions, especially in the absence of efficient civil service regulations. By a gradual process, two distinct bodies of legislation were harmonized and became in fact one general law.

The qualifications of the chief executive of the city are couched in the most general terms, but approach a more specific statement concerning his financial powers and those of veto and appointment.

In the selection of the mayor the American municipality furnishes no precedent of the choice from another city of a successful mayor who has mastered the business of city government. Men of no training or experience will present themselves for offices of responsibility so long as the public demand no other qualification. In the selection of the mayor of Chicago, the pliable standards fixed by public opinion are the only qualifica-

April 8, 1872; and since the veto power had been exercised over all legislative acts of the council, the charter power of 1863 was in force in all particulars.

¹*Council Proceedings*, March 17, 1879. "He [mayor] cannot veto a part of an item that he may consider excessive or unnecessary."

tions considered. The office of the mayor is a prize to be contested for by all the methods known to our political system, which tends constantly to emphasize the least essential feature of his position, and to minimize the qualities necessary to a vigorous and scientific treatment of the problems of municipal government. His political position dominates his administrative position. It is largely a party responsibility.

Several causes have operated in the history of Chicago to differentiate legislative and executive functions. Begun during a period in which the council was not so reluctant to surrender its charter powers, this tendency has gathered momentum with the years, until it can be traced in a definite manner. The current view that the growth of executive power has followed through public distrust for the council, should be given some weight, and especially in recent years; but it should be noted that this process of differentiation started at a time when the charges of corruption against the council were not so prominent. Historical considerations point to administrative necessity as the essential factor that started this tendency toward the separation of executive and legislative functions. On the other hand, municipal corruption is explained by reasons more deep-seated than the shifting of power from the council to the mayor. The transfer of administrative functions from the council to the mayor has not robbed the former of its position as the central fact in the municipality of Chicago.

The mayor of Chicago embodies all essential executive power. In the broader sense, he represents the general police power of the state, within the limits of the municipality, in the interest of peace and good order. This is an emergency power, and links the municipal police with the military power of the state.¹

At what point then does the mayor's administrative control

¹Strike of 1895. An interesting survival of the direct police control of the mayor appears in the four "mayor's police" directly appointed by him and subject to his orders without interference on the part of the council.

begin? The position of the city executive to the administrative work of the city is generally measured by his power to appoint and to remove the heads of the administrative departments, and consequently to control over the whole civil service. The appointing power of the mayor of Chicago is stated in general terms, and includes all offices not otherwise provided for by the charter law. This ultimately means that all corporate officers not elected by the people are directly or indirectly named by the mayor.¹

The elaboration of the administrative system since the adoption of the law of 1872 has prodigiously increased the appointing power of the mayor over the personnel of the service.² But the control over the civil service is never complete without the supplementary power of removal. The appointing power of the mayor, however, is not unrestrained; but limitations are imposed through the advice and consent of the council.³ The charter law of 1872 is silent upon the question of the mayor's power to remove, but it has been defined in supplementary legislation.⁴

The arbitrary method of the removal of officers by the executive received a check in the requirement that the mayor shall inform the council of intentions and reasons for removal within a stated period; and a failure to render such an account invalidates the dismissal. A second check in the form of a two-thirds' vote which prevents removal fixes more closely the control of the council over the civil service. The position of the mayor has been recently modified by the civil service law of March 20,

¹The governor of the state cannot appoint municipal officers. *People vs. Hoffman*, 116 Ill., 594.

²The council may create any office necessary to the life of the municipality.

³After April 5, 1898, the mayor may appoint a secretary for each ward at a salary of \$1,500.

⁴Law of April 10, 1875. This act was repealed by the law of May 28, 1879, and incorporated into the general municipal law by the amending act of May 31, 1879.

1895, designed for all cities of the state. A non-partisan board prepares the lists and conducts the examinations. It is universally recognized that the non-partisan board, upon ultimate analysis, becomes partisan in its nature. The commission is composed of three persons appointed by the mayor. One member is appointed annually with a tenure of three years. The powers of the commission are important, but are not so extensive as the friends of civil service reform desire. The methods of preparing the classified list are similar to those employed by the national civil service commission. The commission frames the rules which shall govern all appointments within the scope of the act. The restrictions imposed upon it pertain to those officers whose tenure is provided and fixed by law, and those who are especially exempt from the jurisdiction of the commission. The heads of the city departments are rightfully exempt from the provisions of the act so long as the theory of executive responsibility prevails. The act of 1895 has been given high rank as a model for similar legislation for other cities of the United States. The law provides for promotions from the lower ranks of the service upon basis of a competitive examination. The method of appointment leaves little discretion with the heads of departments. Upon a vacancy the commission furnishes the name at the head of the list in that particular branch of service. The service is, however, protected by a probationary period and the head of the department may also remove for sufficient reasons. The commission is given certain final powers over all cases of dispute.

The result of this important legislation in a field too little protected from the chicanery and abuses of party politics, is dependent upon the honesty of its execution by the executive officers and by the commissioners. The possibility of political favoritism is not wholly eliminated. The act went further than to establish standards of qualification, but considered in great detail the possibility of destroying the enforcement of party

fealty through political assessment and work. The result of the law depends upon the honest and untiring endeavor of responsible persons to enforce its provisions. The spirit of its acceptance by the people of Chicago establishes a hope in the ultimate success of the reform. Concerning questions of reform it is not so much the position that is occupied at a given time, as the direction of the movement. If conditions are judged rightly, Chicago is moving in the desired direction—toward a permanent, professionally trained civil service, so essential to an administrative system characterized by the intensity and complexity of its organization, and by the technical nature of the problems that must be considered. The law was obviously passed for Chicago, since it affects only those cities above 100,000 persons. It must be observed that the law of 1895 materially alters the relation between the mayor and the heads of departments, in the selection of the subordinate service, as well as in the relation between the council and the mayor in matters of confirmation. The mayor has thus been relieved of much political responsibility by this act. Its result is to make his position one of more administrative significance.

The charter law of 1872 did no more than merely sketch the administrative position of the mayor in the municipal system. The supplementary act of 1875, previously noticed, elaborated his power of appointment and veto, but left to the council the absolute power of fixing his administrative position through its ordinances, as soon as necessity suggested administrative expansion and elaboration. Upon the broad outlines of general legislation, the council has filled in the details of an elaborate system in direction and supervision exercised by the mayor over the whole administration. With the reorganization of the administrative departments, the power of the mayor has constantly grown. In this re-construction of the administrative department, the council has followed with general consistency the principle of executive concentration and responsibility, by placing at the head of each department a single commissioner who

is appointed by the mayor.¹ The council may re-delegate power given it by the state legislature. The law assumes that all administrative functions should reside with the mayor in so far as they are separable from legislative functions, and do not endanger the unity and harmony of administrative work.²

The administrative control and direction of the mayor are attained through the various devices of personal supervision, inspection and examination of the progress of the municipal work. The position of the mayor makes him the chief source of information concerning the current administration which is embodied in the form of annual and special messages and recommendations of a timely and urgent nature. In a request for information the council often assumes a critical attitude toward the administrative acts of the executive.³ The veto message becomes a valuable source in the interpretation of the position of the mayor upon delicate problems of the current administration and on the charter powers.

The official responsibility of the mayor does not only appear in the specific statement of his powers but also issues from the subtler relation that results from his personal connection with the heads of the departments. The definition of legal responsibility avails but little unless that subtler force of personal honesty pervades the whole administrative work. According to the organic law, the mayor becomes responsible for acts of omission as well as acts of commission. In a system where administrative power centers in the person of the mayor, the acts of omission are as confusing in their result as plans ill devised and executed. The problem of an open interest in city contracts so easily solved by charter restrictions is as easily avoided in prac-

¹*Council Proceedings*, May 12, 1879. Mayor temporarily vested with power of commissioner of public works.

²New duties delegated to officers by legislature do not operate as an appointment. *Kilgore vs. Drainage Com.*, 116 Ill., 350.

³*Council Proceedings*, February 14, 1881. In question of the mayor's right to interfere in the construction of certain public works; also, *Council Proceedings*, May 10, 1880.

tice.¹ The charters may fix their limitations but they can in no wise erect a standard of right in official action. The point where private and public interest in business divides is not so easy of determination. The courts have, however, attempted to institute such a dividing line by holding that where a pecuniary interest attaches to any public business, it is a cause for action.² If legal and administrative safeguards against corruption were final against this well recognized phase of our municipal weakness, the purity of the administration of Chicago would pass unchallenged. Administrative organization has its essential and central purpose in the creation of a system that will conserve the moral forces of a community, prevent administrative waste, and make difficult the development of destructive tendencies; in short to create conditions that will best foster and preserve the elements of civic strength. The administration must utilize those high standards of right and honesty which issue from the home, the church and the school; it cannot create them. The framers of an administrative system have a right to assume, that the home, the church and the school effectively discharge their functions in the creation of ideals and standards of integrity, that will become part and parcel of public and private life.

In another place the relation of the mayor to the council has been suggested. It was pointed out that by virtue of the organic law, the council was composed of two factors: the mayor and aldermen. A clearer separation of executive and legislative functions has tended to restrict the direct personal relation of the mayor to the council to that of a presiding officer. Previous to the adoption of the present law this position carried with it much power.³ The present position of the mayor in the council is purely parliamentary, and possesses no further power than

¹*Council Proceedings*, January 3, 1881, resolution of council directions to the department of public works.

²*Sherlock vs. Wennetka*, 68 Ill., 530.

³*Council Proceedings*, December 4, 1871. "The duties devolving upon a presiding officer are onerous, the office itself being second only to

that of a tie vote.¹ He appoints no committees and influences in no manner the organization and policy of the council, except as this can be done through his rulings. It has been contended that the mayor is not a necessary legal factor of the council for the transaction of business.² His position as president of the council emphasizes on the one hand the influence that he may exercise over the debates of the council, and on the other hand the feelings that would lead him to form a biased judgment. While this view would not be universally conceded, it is obviously true that the present arrangement is the most cumbersome and meaningless that could well exist between the council and the mayor. If there could be assigned no other reason than the element of time required to the discharge of these duties, and to restrain the violent breaches of the parliamentary code, and to pass upon personal differences—all these would warrant a complete separation or a more effective relation. That the mayor should be present at the sessions of the council we hold to be a position unassailable, but not in the capacity of mediator in parliamentary strife, in the routine work of a presiding officer. The veto power establishes the strongest tie between the executive and the council. The veto which has gained so complete a recognition in our political system, both federal and local, may be said to be peculiarly American. In the case of those cities, where the single legislative chamber prevails, the mayor's veto exercises a check upon hasty legislation, not imposed by the presence of a second chamber. Drawn from the provisions of the federal constitution, it has had a natural and logical application to local government. In the absence of the parliamentary cabinet, the executive veto was the only logical solution of the proper check to be imposed upon the local legislature.

The mayor's bills of 1872 and 1875 clothed the mayor in the that of the mayor within the gift of the municipality." Address made before the passage of the mayor's bill.

¹Carrolton vs. Clark, 21 App., 74.

²Mayor's address, April 18, 1892. Mayor Washburn accepted this view and followed it out.

state of Illinois with the important power of veto. The executive approval is necessary to all acts of the council, and may follow in two ways: by direct approval, or by lapse of time. The veto extends to the whole ordinance except in the case of an appropriation bill. All acts of the council are considered as ordinances, and as such must bear executive approval. In order that the objectionable features of the appropriation bill may be reached without endangering the validity of the whole act, the mayor is permitted to affix his signature of disapproval to specific items. The exceptional treatment of the appropriation ordinance by the council has been noted.¹ The financial veto follows in the interests of economy by striking out unwarranted and suspicious items that may find their way in the budget. Since the revenue ordinance must be passed before a given date and voted but once, the special financial veto prevents the introduction of unnecessary items or excessive individual expenditure. The mayor is thus provided with an important weapon in the interest of hasty financial appropriation, but his objections must pass the scrutiny of a two-thirds vote of the council. The interpretation of this special veto is obviously open to differences of opinion, and the courts have handed down a number of decisions that have attempted to define the financial relations of the council and the mayor. The exceptional treatment of the appropriation bill has led the courts to take the view that the mayor is distinct from the council in the passage of appropriation ordinances.² In 1879, the mayor vetoed the entire appropriation bill on the ground that he possessed no power to veto a portion of any one item, but must veto the item as a whole.³ The item was excessive, but necessary, and led to the veto of the entire bill in order to insure the insertion and modification of the item.⁴

¹King vs. Chicago, 11 Ill., 66. See page 75 ante.

² King vs. Chicago, 111 Ill., 66.

³*Council Proceedings*, March 17, 1879; also April 7, 1884.

⁴Council passed a separate bill for the Health Department; also, *Fairfield vs. People*, 94 Ill., 245.

In 1881, specific items providing for future services and materials were vetoed on the ground that the council was encroaching upon the discretionary power of the mayor, since those subjects were administrative rather than legislative in character.¹

The clothing of the mayor with magisterial power is a familiar precedent in Anglo-American practice. The mayor of Chicago at different periods has been encumbered with judicial powers but the organic law of 1872 has shorn him of the trammels of an out-grown tradition and judicial power no longer resides with him.² The council cannot delegate judicial powers since none such have been conferred upon it by the charter law of 1872. The mayor thus stands out clearer in his administrative capacity, but this position, on the other hand, tends toward his isolation from the council, and there remains the executive veto and legislative consent to his appointments as the only ties that make for harmony in the city government. The further consideration of this relation will be reserved for another place. The progress of the city under the law of 1872 has resulted in establishing the position of the mayor as a vigorous fact in the administration. Special powers have been conferred upon him by the council, as well as those implied by the organic law. On all sides his discretionary powers have been elaborated until a vigorous mayor has abundant opportunity to impress his personality upon the life of the municipality; but, on the other hand, an evil, designing and inefficient executive possesses the same opportunity for the effective perversion of good administration. The relation of the mayor and council in the Chicago system suggests obvious criticism. It has evolved from crude conditions. A closer relation should be established. The council still remains as the central fact in the city of Chicago; but it remains unquestioned that the trend of events has conspired to impart a new vigor and vitality to the executive, which stands ready to absorb all elements of strength that have not been conferred upon the other organs of the city.

¹ *Council Proceedings*, April 11, 1881. Veto message of the mayor.

² *Beeman vs. Peoria*, 16 Ill., 848.

CHAPTER X.

ADMINISTRATIVE DEPARTMENTS.

Since the adoption of the law of 1872, the administrative departments of Chicago have been organized upon an uniform basis. The evolution of these departments is traceable in the changing conditions which have forced the rejection of old types of organization in their readjustment under the present charter. Unguided by a clear vision into the needs of institutional development, the city of Chicago has repeated a well-known chapter in American municipal history. In the organization of the administration under the previous charters, the state and municipal legislatures have constructed a patchwork system, characterized by administrative confusion and chaos, which has followed by the creation of administrative authorities in the same territorial jurisdiction in the absence of the necessary co-operation and subordination. The efficiency of administrative organization is measured by the degree of correspondence of functions to social and economic environment. The law of differentiation means the close and intimate connection between institutional organs and functions. Specific institutions should perform a specific service. Specific organs should discharge specific functions. So the logical process in administrative evolution is that, with the appearance of new functions, a new organ should be created. On the other hand, the multiplication of administrative organs, without the increase of functions, leads to administrative waste. The failure to recognize this fundamental principle has led to the mistaken identity of organs and functions in the growth and development of municipal institutions. Chicago has suffered, with other cities, by the multiplication of organs following with wonderful rapidity.

We have pointed out with sufficient clearness, in the historical sketch, that the board was the prevailing type of depart-

mental organization. In most instances it embodied the principle of partial retirement. The present material development of Chicago dates from the great fire of 1871, while the present administrative system begins with the adoption of the general law of 1872. The departmental re-organization proceeded along the lines fixed by general legislation which permitted a wide latitude of discretion on the part of the council. The mayor's bill of 1875 furnished a working basis for the introduction of the single commissioner system. The spirit of executive concentration had fairly begun to pervade the municipal system at this period, and the mayor was henceforth to be the center of administrative forces. It was generally argued that the board type was antagonistic to executive concentration as suggested by the mayor's bill. The re-organization of the departments was begun immediately after the adoption of the general law of 1875. With the exception of the school administration, the board type of organization has been wholly supplanted by the single commissioner system. The board type still exists in this important phase of city administration, and affords an opportunity to compare the two systems of administrative organization. The single commissioner type prevails where administration is most vigorous and successful. A consideration of the relative merits of the two systems will be reserved for another place. In the first place a badly conducted board administration with quasi-legislative powers, and in the second place the fact that it was not in harmony with the theory of executive concentration, led to the repudiation of the board type in the city departments of Chicago.

Broadly speaking, the departmental administration, previously to 1876, was conducted by boards composed of three members. It was an era of boards. These boards had their beginning in an attempt to make them representative of local interests in the city administration. This localism was especially strengthened by the presence of the three natural divisions of the city; but with the growth of municipal consciousness this

localism has been merged into a closer administrative structure. While a feeling of localism is discernible in North, West and South Chicago, the administrative compactness of the municipality checks the expression of this feeling. On the other hand, the presence of the park boards and towns, as well as the traditions of the municipalities merged into the greater Chicago in 1889, stimulate a localism that is expressed in the social structure of the city, rather than in its administrative arrangement. The fire and police departments were organized under the board system during the earlier charters; the health administration by the charter of 1851; the water service by the act of February 15, 1851; the sewerage system by the act of February 15, 1855. These boards were all composed of three commissioners, representing the three natural divisions. The school administration has always been organized upon a board basis, but was nominally separated from the municipality in 1857. The source of tenure of the boards was not uniform. In some instances the council named the members, while in other instances they were elected by the people. During the years 1861-67 the departmental administration was thoroughly representative of popular will, since all the boards were elected directly by the people. In 1867, the power of appointment was transferred to the mayor, which may be taken as the beginning of executive concentration.¹

The board system of this period continued almost uniformly till the year 1876. It must be noted that the financial administration, from its inception, has been organized according to the single commissioner plan, although discretionary power was not lodged with the departments, until the adoption of the present charter. The principal reason for the presence of this form of organization for the financial administration is to be sought in the uniform types employed by federal and state financial systems. The change to the single-commissioner system was begun with the department of public works.² The remaining depart-

¹ *Council Proceedings*, March 15, 1883.

² *Council Proceedings*, September 8, 1876.

mental boards were gradually transferred to the single-commissioner system.

Scarcely had this change been accomplished when a notable attempt was made to re-instate the board system.¹ The arguments for executive concentration were strongly stated in the minority report, and were in full sympathy with the movement in Chicago and elsewhere. The inefficient board administration of the previous years, as well as the fear of a divided responsibility made possible by such a system, were vigorously set forth. The fatal error was championed and sustained that, in municipal administration vigorous action is more essential than the consultation, which was embodied in the board system. The limitation upon official discretion and authority was emphasized as a correct guiding principle. The theory of executive responsibility and accountability triumphed.² Chicago administration is thus in line with the movement worked out in other large municipalities. This type of organization is not in harmony with the best traditions of our administrative institutions; and, although the representative features of our local administrative systems have often proved unsuccessful and their history is too often written in corruption and mal-administration, yet the principle of excessive executive concentration can only be considered as a tentative solution of the problems of departmental organization. It is too clearly bureaucracy. The tenure of the heads of the departments is conterminous with that of the mayor; each serves two years. The civil service regulation in no wise affect the heads of the departments, who are appointed by the mayor and confirmed by the council. The head of each department appoints his subordinate service with the approval of the civil service law of 1895.

The relation of the heads of departments to the mayor is per-

¹The committee made a majority report in favor of a return to the board system, but the council failed to sustain it. The minority report was followed. *Council Proceedings*, March 15, 1883.

²*Council Proceedings*, May 10, 1880.

sonal; there is no trace of the cabinet feature in the relation of the mayor to his heads of departments. In considering a line of policy the mayor may consult the heads of the department particularly concerned; but there is nothing legal or compulsory that will insure open, mutual consideration of plans and conditions before a given policy is projected.

The heads of departments are confirmed by the council; but this is doubtless becoming a useless form, since political courtesy and practice permits the mayor to elect his personal advisers without serious scrutiny upon the part of the council. This position of the council, in so far as it be considered as a settled principle, is wholly voluntary, but it is no less essential to the theory of executive concentration. It tends to exclude more clearly legislative interference from the work of administration, which should follow so long as the city adheres to the theory of executive concentration. So long as the work of the mayor and the council does not pertain to political matters of the more objectional nature, there seems to be a more limited use of the veto and the right of the council to object to executive appointments. The most effective control over the administration of the city by the council is exercised through its right to define the powers and duties of the officers and heads of departments, and to control the broad outlines of the administration through legislation. The ordinance power of the council amounts to one of regulation. Since the differences are not drawn between the legislative ordinance and the executive order, either in form or in subject matter, it rests wholly with the council to limit its own action upon all questions of municipal policy. It lies within the power of the council to shape and to control all essential matters of administration through the ordinance. This is not in harmony with executive concentration, and has led, and always may lead, to conflicts, until a settled field for executive initiative is established by the courts, or by the state legislature. The mayor and heads of departments possess a control over the administration by means of the executive order. But

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the point where the executive initiative begins, through the order or instruction, is uncertain. It is obvious that the scope of the supplementary and instructional ordinance is extensive, and opens to the mayor and heads of departments a wide control which materially strengthens their position over the administration of the city. It may be observed that the relation of the heads of departments to the mayor and council is yet in its transitional stage, with certain tendencies that operate to establish larger spheres of influence for the executive in formulating the policies for the government of the city.

CHAPTER XI.

THE ADMINISTRATION OF FINANCE.

One of the most important investigations to be made in the field of municipal activity will deal with the financial problems of the city. The intimate relation of the budget to the whole administration makes this particular field one of primary importance to many of the problems of current discussion. In close connection with the local and state financial system, lies the fundamental problem of the redistribution of administrative functions between the state and local units.

The financial administration of the localities is protected by certain safeguards, not known and considered necessary to other departments of administration. The state constitution is the point of departure in determining the limitations imposed upon the financial organs of the local units. The constitution of 1870, restrains the state legislature from imposing any tax upon a municipal corporation for corporate purposes; but, on the other hand, protects the credit of the municipality by holding all taxable property within the city limits subject to taxation for any debt, created by contract, with this exception, that private property cannot be sold for corporate debts.¹ Furthermore, municipal indebtedness cannot exceed 5 per cent. of the value of the taxable property.² The constitution provides still further that for each act of indebtedness there shall be provided a direct tax sufficient to meet the annual interest, and to discharge the principle in twenty years.³ The general use of the fund system in the financial administration of Chicago since 1870 is

¹Constitution of 1870, IX., 10.

²Ibid. Sec. 12.

³Constitution of 1870, IX., 10.

intimately connected with this constitutional provision. By special constitutional amendment the city was empowered to increase its bonded indebtedness for purposes of the Columbian Exposition.¹ In these constitutional provisions appear nothing materially different from the treatment accorded the municipalities of other states. It is a kind of financial check almost universally employed in the American system. The exact per cent. relation of indebtedness to taxable property, and maximum per cent. limitation upon revenue are checks that have little to commend them when viewed from their results in practice. Combined with other features, these restrictions have led to hampered revenues and have brought to the city bad financial methods. The structure of the financial administration of Chicago is suggested by the charter law. No branch of the city administration has been so generally modified by the development of the other city departments as that of finance. The financial power of the common council has been outlined. The control of the council centers in the annual budget. The council alone creates municipal indebtedness, votes bonds, levies taxes and provides for expenditure. The relation of the financial administration to the mayor appears in two ways: in the exercise of an important financial veto and also in the appointment of the head of the financial department. The mayor's relation to the head of the department is direct and personal. The council and mayor are not, however, to be considered as constituent factors in the departmental organization, but rather agents of creation and control.

The discretionary head of the department of finance is the comptroller, who may be considered the most important administrative functionary below the mayor, if measured by the responsibilities of his position. Immediate, discretionary financial supervision centers in the person of the comptroller. The annual budgetary statement establishes his close and important relation with the council. Under the direct supervision and

¹Amendment of November 4, 1890.

control of the comptroller are organized the clerical forces of the department. A detailed consideration of the discretionary powers of the comptroller must be sought in the ordinances of the council. In the enumeration of his powers, appear all the fiscal services of the city which are administrative in their nature. He is the fiscal agent of the city; an important factor in the formation of contracts, in the sale of bonds, and in the solution of those questions of a discretionary nature, which require definite responsibility.

The instruments of financial control centering in the office of the comptroller enable him to exercise a personal check upon all items of expenditure. His signature is necessary to all warrants authorizing an expenditure. The joint session of the financial committee of the council with the comptroller for the purpose of comparing the reports and statements of the financial bureau, brings the department into closer personal relation with the council. There are important possibilities in this arrangement. His signature is necessary to all contracts above \$500. The important discretionary powers lodged with the financial department, imply an executive of business ability and tact. The energy and vigor of the financial administration is largely the energy and vigor of the head of the department. The budgetary statement representing the multitudinous services and ramifications of the whole administrative system, enables the department to shape its financial policy in accordance with the fiscal needs of the city.

The remaining factors, constituting the financial organization of the city, possess little discretionary power, but are so constructed as to form a system of checks.

The treasurer was, in the earlier years of the municipality, the responsible head of the fiscal administration. He was early elected by the people. The triumph of the principle of executive concentration has set over the treasurer, the discretionary office of the comptroller, and has thereby reduced the treasurer to a clerical position. The city treasurer stands for system in

public accounts.¹ Upon the itemized statements of the treasury office, the budgetary forecasts are made. Through this office flow all revenues and from it issue all expenditures. The numerous checks provided against unwarranted expenditure leaves the treasurer with little power to influence the work of the department.

His powers and duties are concerned with the arrangement of a system of accounting. Upon all questions of dispute between the treasurer and the comptroller, the financial committee of the council is the court of appeal, subject to the revision of the council.

The revenue branch of the treasury department is directed by the city collector. He supervises the machinery for the collection of revenues and serves as a check upon the treasury office. His powers begin with the warrant of collection. His duties are wholly clerical and require great personal care and honesty.

Viewed as a whole two causes have operated to extend the machinery of the financial department: the first is found in the financial demands of the city, and the second in the principle of checks and balances. The checks appear largely in the constitutional forms already noted; and in the provision that the municipal revenues shall be assessed and collected according to the tax system of the state. Special assessments are available for certain public works, and if sanctioned by a popular referendum, the city may give assistance to quasi-public corporations. The modern municipal charter is constructed largely upon the theory of checks and balances, and especially does this appear in the structure of the financial administration. The modern charter usually presents a strange anomaly of a number of competing responsible organs in a so-called system of concentration.² In the financial administration, concentration, theoretically, stands

¹Smith vs. Woolsey, 22 App., 185.

²The most notable example of the use of this principle in charter construction is found in the Greater New York charter.

for vigorous action: the principle of checks may operate to stultify the energy of the administration. Checks for the sake of checks have little place in administrative organization. It embodies a mechanical principle which may break down in the weight of its machinery. The system is efficient when the correspondence between organ and function is correctly worked out. The principle affords an administrative makeshift which leads to the duplication of organs in order to serve the purpose of a check, and ultimately defeats its end through its own complications. All the requirements of financial safety are fulfilled, when the point is reached which insures the protection of financial agents against fraud and imposition, and beyond this point duplication begins, and results in the loss of directness in administration. If the principle of checks and balances is any guarantee against mal-administration, the municipality of Chicago is amply protected. The application of this principle to the treasury department is forcibly illustrated by the fact that any warrant for expenditure must bear the signature of the mayor, the comptroller, the city clerk, three members of the finance committee, and a voucher for each certificate must be placed upon file in the office for inspection.¹ Warrants of expenditure are elaborately "checked" by a system of record in various offices. The first check appears in the signature of important financial officers; the second in the duplication of warrants; the third in a series of reports and statements of the comptroller; a fourth is in the system of accounting; a fifth in the use of the special "fund" which flows from certain definite taxes, and which follows certain specific expenditures; the sixth and final is the annual budget. The budget is the summary check upon all others, and presents a graphic picture of the financial condition of the city at the end of each fiscal year with reference to future requirements.

The outline of the financial administration of Chicago is incomplete without a consideration of the administrative entangle-

¹Report of 1875 to the council.

ment of county, town and parks and their authorities. Only their financial relation to the municipality can be considered in this place.¹ In the tax system of Chicago is to be found the only important and intimate connection between the town-county system and the city. The constitution of Illinois provides for a uniform system of taxation, into which is fitted and adjusted the revenues of the various local units. An outline of the state system is therefore necessary in order to present a correct view of the position of the city in the general scheme of taxation. The tax assessments of the state are apportioned by two boards of equalization.

The state board of equalization is elective, each congressional district returning one representative for a term of four years. In its annual session it considers separately the following classes of property: personal, railroad and telegraph, lands, and town and city lots.² The powers of the board are more comprehensive than tax equalization, but are extended so as to include original assessments on "railroad tracks" and "rolling stock." The immediate subject matter, reviewed by the state board, is the reports of the county boards. The aggregate assessment for the state cannot be reduced nor can it be increased beyond one per cent. There is a tendency for the country members of the state board to shift a disproportionate amount of the taxes upon city values. The city in turn attempts to escape this burden by adjusting its assessments so as to avoid such discrimination. It is, however, in the county that the inefficient nature of the board of equalization appears. Cook county is special in its whole organization. The mixture of rural and urban elements vastly increases the difficulties in Cook county. The values, returned by the assessors, can in no instance, be reduced except for purposes of equalization nor can they be increased, except to meet the revenues considered as necessary. A separate rate for each class of property is fixed by the county board, with the exception

¹See appendix for recent legislation.

²Hurd, *Revised Statutes*, p. 1290.

of "railroad tracks" and "rolling stock."¹ The work of the board is based upon the return of the town assessors, and the important powers lodged with it gives it a position of great administrative importance. The difficulties of the position of the Cook county board appear in the economic and administrative structure of the territory which it reviews. The board may compel new assessments to be made by a town. Cook county is composed of thirty-three towns, seven of which are wholly, and five partially, within the municipal territory. In this connection must also be considered the three park districts and the Chicago drainage district. The complications arising from these superimposed tax areas are obvious, while the problem is made still more intricate by the absence of system or standard of valuation employed by the town assessors.

The county board of equalization stands for the principle of central control over local assessment, but the method it is compelled to employ has induced and encouraged a pernicious rivalry on the part of the various town assessors, not only between the towns within the city but also between the urban and rural units. It is tacitly understood that one of the desirable qualifications of a town assessor is an active and watchful care in the return of low assessment values. Honesty in assessments, and uniformity in tax values for the whole city are, therefore, lost in local rivalries and tax evasions.² The injustice of this system appears in the neglect of the county board to enforce a better standard of valuation, or to institute changes. Up to this point the municipality has little connection with the system. It establishes its right to participate in the revenues from the personal and real property within the city through the appropriation ordinance of the council.³ Here, however, the power of the municipality ceases, and the work of the town-county system commences. The administrative structure of the city places

¹Hurd, *Revised Statutes*, p. 1279.

²Chicago vs. Larned, 34 Ill., 203.

³Taylor vs. Thompson, 42 Ill., 9.

this important task upon the weakest part of the tax system, and enables the spirit of rivalry to vitiate the whole financial administration. A single corps of officers assess and collect the revenues. Complications in the assessment of personal and real property have arisen from the use of a system instituted before the present property values in the city had assumed their importance and complexity. Values have largely changed from the tangible and real personal property of a less complicated economic community, to the intensified form of stocks and bonds, which are difficult to reach by the ordinary taxing power, and which is practically impossible by the methods employed by the assessors of Chicago. A system of undervaluation of property is a result which has forced the city to confront a condition of meagre revenues, in the midst of rich resources in real and personal property. The system of abnormally low assessments has resulted in inadequate revenue and has forced the city upon miscellaneous list of indirect taxes, such as licenses, fees, fines, etc., in order to meet the growing demands of administration. Not only has chaos and evasion resulted, but also a system of injustice in the levies of the city. Inadequate revenues from direct taxes have forced the municipality to incorporate indiscriminately every possible source of indirect revenue.¹ A reform of the financial system must advance in two directions: in the first place, a better grouping and classification of the sources of revenue, and in the second place, a readjustment of the machinery of assessment and collection. While the two phases of the question are closely related, the incidence of taxation does not fall within the field of administrative organization. The discussion of the second point will be deferred until the administrative relation of the towns to the municipality is considered. The logical solution of this perplexing problem lies in the redistribution and classification of the sources of revenue, so that the state and local units shall possess so nearly as possible their own sources of taxation and objects of expenditure. The towns are

¹Labor report of 1894, for Ill.

the basis of tax assessment and collection, and derive their importance in Chicago from this fact alone. The bungling manner in which they perform this work is the most conclusive argument against their right of existence. Administratively, the towns of Chicago have long forfeited their right of existence by a failure to perform the essential work for which they are retained. Reorganization of the financial administration is demanded. The state recognized in a limited way the failure of the town system by providing state assessments of "railroad track" and "rolling stock." The economic forces within the modern state have assumed a different significance than at the period when the tax systems of most of our commonwealths were formulated. In the adjustment of the rates of taxation, the state recognizes three distinct claims of revenue, based upon a territorial division. The state revenues are built up by advancing a certain rate by the localities. The intermediate administrative unit, the county, may extend its revenue to an aggregate of seventy-five cents per one hundred dollars of valuation, while a popular referendum is necessary for an increase in the rate beyond this amount. The county is the basis of tax distribution, and the law provides that the cities and towns shall certify annually to the county authorities the amount of taxes they severally require to be raised.

It has been shown that the organ of certification for the city of Chicago is the common council. This power is based upon its control over the material interests of the city, and the fundamental consideration that all appropriations must flow from the municipal legislature.¹

What are the primary sources of revenue provided by the state of Illinois? These sources are considered as direct, and in no manner pertain to that board group of revenues provided by the exercise of police regulation.

1. All real and personal property.

¹ Act of May 3, 1873. Also, *Chicago vs. People*, 78 Ill., 570; *Thatcher vs. People*, 79 Ill., 593.

2. All moneys, credits and bonds, and other investments *in transitu* held and controlled by persons living within the state.

3. Capital stock in bonds.

4. Capital stock of companies incorporated under the laws of the state.

The administration of these primary sources of revenue is lodged with the towns in accordance with the general scheme of assessment and collection. But in addition to these primary sources, the municipality is empowered to create a vast list of supplementary revenues.¹ The relation of these supplementary revenues to those which are to be considered as primary emphasizes strongly the inequalities of the tax levies for the city of Chicago, and affords patent reasons for a reform in its tax system. The most important supplementary revenue assumes the form of a direct special improvement tax, available for all local units.² The remaining secondary sources of revenue are peculiarly municipal. Causes already noted have tended to prevent the municipality from coming into possession of its proper revenues from the direct sources of real and personal property. Tax evasions and low assessments have compelled the municipality to replenish its revenues from other sources to meet the current demands of administration. The general result has been an unwarranted and disproportionate use of varied means to supplement the direct revenues of the city. Insufficient revenues have not been the most pernicious results that have followed for the people of Chicago, but the moral effect of its financial system is the most vital argument for reorganization. It stands as an open invitation for the practice of all species of chicanery, and poisons the business interests of the city, and consequently affects the whole life of the community. Furthermore, it not only invites, but creates, conditions which make the practice of dishonesty in tax assessments almost a positive necessity. An honest assessment of the market value of real property would

¹Braun vs. Chicago, 110 Ill., 190.

²Enoch vs. Springfield, 113 Ill., 70; also Wright vs. Bishop, 88 Ill., 302.

work financial ruin in a modern competitive system, and especially in the intensified form that it assumes in Chicago.¹ The relation of the supplementary sources of revenue to the primary sources can best be shown through a brief classification.

One of the most important of these secondary sources is the license. Theoretically the license is an instrument by which the police authority is able to reach and control certain business interests. Its revenue features are secondary, but this view has been too frequently reversed, and its revenue features given a first consideration. This would be especially true of a city that possesses so little control over its primary revenues. The council possesses full license power in all its details.

The license power has been minutely extended by the council until it touches most of the business interests of the city.² It extends not only to those businesses of a public nature in the form of entertainments and exhibitions, but to those varied interests that pertain more particularly to the economic welfare of the city, and especially those businesses which endanger the health and morals of the community, and afford opportunities for fraud and questionable dealings with the public. The business license has widened its scope with the growth of a complex economic life.

Fines and penalties approach more closely a police measure than does the business license. Designed to enforce obedience to the ordinances of the council, it assumes the form of a municipal revenue, unless otherwise prescribed.³ The importance of fines, as a contributing source to the municipal revenues, depends upon the efficiency of police regulations within the city. It has been customary in the treatment of this form of revenue

¹Whitten, *Journal of Political Economy*, V. 175: It is here pointed out that in the central business districts the taxable values are 9% of the real values, and the rate of equalization as low as 11%.

²Kingsley vs. Chicago, 124 Ill., 360.

³Mt. Carmel vs. Wabash Co., 50 Ill., 69.

to set apart certain fines to the support of some specific branch of public administration. Fines imposed for negligence in the performance of duty in the fire and police services constitute an important part of the relief funds of those departments.¹ In accordance with this time honored practice the schools of the city derive an important support from fines. The fine becomes a pliable instrument, and in times of financial distress has been known to afford the principal support of the current administration.²

The fee system attached to the offices of the various superimposed areas has long been known for the flagrant abuses connected with it. The contributions to the revenues of the city through fees are not so important as its bearing upon the salaries of certain favored officials. The abuses of the fee system appear largely among the rural units within the city, although certain important financial officers are made sharers in its unequal advantages. To these secondary sources must be added the revenue flowing from the water rates and the meager contribution from the city franchises.

The sum total of the supplementary sources build a very important part of the whole municipal revenue. As the enormously increased administrative demands have severely tried the tax-paying power of the city, so the secondary sources have become of an ever increasing importance. In the use of those various secondary sources of revenue the council has followed no system or theory which would differentiate the police nature of the license, fee and fine, but has freely employed them whenever there was promise of revenue, from the payment of the privilege to use bricks in the construction of a home to the exactions placed upon those vilest traffics which are practiced in great cities. The financial administration of Chicago is thus

¹ Act of June 23, 1883.

² See Allison and Penrose, *Philadelphia, Johns Hopkins University Studies*, II., 113.

ripe for radical reform.¹ It is questionable whether any other municipality of equal importance has incorporated in its revenue system so many patent abuses and inequalities. The whole system is founded upon tax evasion, upon the part of the citizens, and unequal exactions upon the part of the municipality.

¹See Appendix.

CHAPTER XII.

DEPARTMENT OF PUBLIC WORKS.

In close relation to the financial administration stands the department of public works as the principal expending department of the municipal administration. The department was recognized as a branch of the administrative service as early as 1861.¹ This step had in view the co-ordination of the six services connected with public construction, and those closely related services. At the head of the department at this period was the board of public works, and operating under its supervision were the co-ordinate services of the water, sewerage, parks, streets, river and harbor, and public buildings. This step was significant not only in the co-ordination of those related branches, but also in the destruction of a number of boards which were formerly at the head of the various branches that constituted the new department. Simplification and co-ordination were the distinct services rendered the administration of public works by the institution of the new department.² The report of the commissioner points to a gain not only in rents, salaries and economy in construction, but also to a more orderly and systematic control over the financial operations of the whole department. Measured by its subsequent results, this act of consolidation was one of the most important administrative changes in the departmental services of the city. It has furnished the basis for the organization of the various administrative departments.

Peculiar burdens have fallen to the department of public works since the destructive fire of 1871, which left few traces

¹Report of Commissioner of Public Works, February 24, 1862.

²The significance of this change is emphasized by a saving of \$3,000.00, made in rents and salaries. Commissioner's Report of February 24, 1862.

of the previous work of construction, and confronted the department with the task of a system of streets and public works to be wholly reconstructed. It has been shown that the organic act of 1861 made the board elective, but the act of 1867 not only changed materially its powers, but also made it appointive. The organization of the department remained upon this basis till 1876, when the board organization was abolished and the single commissioner system instituted.¹ The mayor was made the temporary head of the department, till May, 1879, when a commissioner of public works was provided.² The department of public works was the first department to be organized in accordance with the theory of executive concentration. The commissioner was made the responsible head, and successor of the old board. His powers extended to the control and management of all business connected with public construction. His power of appointment and removal of the subordinate service, with the consent of the mayor, and under the present civil service regulations, has placed him in a position to supervise and to direct the various services of his department. The office of commissioner of public works is one of great financial importance, because of its close relation to the formation of contracts and because it is the most extensive disbursing department of the municipality. Vigilance, efficiency and integrity are qualities which should characterize the work of the commissioner. In 1881, the council defined more specifically the relation of the department to the city council, and the relation of the several bureaus to the whole department.³ In 1893, the bureau of street cleaning was transferred from the health department to that of public works. The financial powers lodged with the commissioner of public works extend to the collection of dues

¹*Council Proceedings*, September 18, 1876: This change encountered some difficulty in the two-thirds vote required to alter the organization of the department.

²*Council Proceedings*, September 19, 1881: The Board system had bred sectional rivalry upon the basis of divisional representation.

³*Ibid.*

and licenses that are directly connected with the use of the water and sewerage systems.

In the construction of public works, the principle of the lowest responsible bidder is employed as a basis of contract for all sums over five hundred dollars. In all amounts below this sum the commissioner may exercise his discretion without the approval of the mayor; or, upon a two-thirds vote of approval by the council, the commissioner may enter into a contract for public works without the consent of the mayor. However, in instances where the contract price must be met by special assessments, one-half of the revenue must be paid into the city treasury before the contract can be concluded by the commissioner unless the council has given its consent, which requires a two-thirds vote. A specific check is placed upon the commissioner for all contracts for work or supplies by requiring the consent of the council, except in cases of necessity or where the contract price falls below five hundred dollars.

In connection with legislation upon the subject of contract, the council has provided protection for the workmen employed in the construction of the public works of the city. This legislation is designed to protect the employees and sub-contractors in certain contingencies. The commissioner is authorized to incorporate into the contract a provision that if there is reason to believe that the contractor has neglected to discharge his obligation to his employees or sub-contractors, that he shall delay all further assessments and payments until the commissioner is satisfied that all obligations have been fully discharged. The municipality further protects the workmen, sub-contractors and employees by reserving a fund of fifteen per cent. of the contract price to meet all neglected payments due from the contractor. Where neglect is apparent, the commissioner is authorized to give proper notice to the contractor to discharge all payments due his employees, and upon the failure to regard this order within a period of ten days, all payments by the city to the contractor cease, and are applied directly by the municipality to

the unpaid employees and sub-contractors. If rightly enforced, this provision amply protects all parties against the neglect, or fraudulent intent upon the part of the original contractor. The ordinance does not, however, permit the department to stipulate the conditions of the wage or length of the labor day. The only possibility of such regulation appears in those lesser constructions where the department may employ its own force; and any attempt to fix a standard of fair wage would prove inefficient under the limited power of the city to construct its own public works. But in 1889, the council fixed the legal working day at eight hours for all persons employed directly upon public places.

The formation of contract opens to the department a source of temptation of the subtlest nature. It is at this point that all legal restrictions and checks fail, unless supported by official honesty and integrity. The solution of this question depends essentially upon the latter element. The laws may demand that the officer shall not participate in the profits of contract; may provide that any official who disregards these regulations shall be deprived of the emoluments of his office; but unless these are supported by a deep sense of official honesty, they will prove of no avail. The atmosphere of contract formation is too exclusive and concealed; it invites fraud and bribery. While these words do not apply particularly to Chicago, it is a well known and conceded fact that it is at this point that much of official corruption and unwarranted expenditures enters the municipal administration. Various remedies have been proposed to relieve the officers of the municipality from criticism that must necessarily be closely associated with any municipal business of so exclusive and concealed a nature as the formation of contracts. Besides the various checks that are instituted by requiring the signatures of important municipal officers, it has been proposed to bring the contract under a more open criticism by subjecting it to a popular referendum, which would shield the honest official from the taint of false public criticism, and

check, upon the other hand, much that would scarcely bear the scrutiny of an honest public inquiry.

In order that the expenditures of the department may be as fairly and as equitably distributed as the nature of the work will permit, its revenues are separated into a series of funds to which all the expenses of the department are charged, with the exception of the item of special assessment. The warrant of expenditure must stipulate to what fund the particular item is charged. The revenues attached to the department fall into four funds, namely: general fund, water fund, sewerage fund and special assessment fund. As the names of these funds indicate, each is available for certain expenses of the department. The general fund covers all general expenses of the departmental work; while the special assessment is a localized fund, and does not apply to all parts of the city. Their purpose is to serve as a check upon all disproportionate expenditure. They afford, also, a means for an easy and accurate classification of the departmental accounts. The other checks upon the administration of the department of public works are those usual to such departments. They appear in the commissioner's accounts and reports rendered to the city council, and the information imparted to the mayor and comptroller, which is an important element in the structure of the financial policy of the municipality, and particularly in its attitude toward the department.

The office of deputy-commissioner was created in 1892 upon lines of confused responsibility. Logically, the theory of responsibility would have subordinated this important office to the commissioner of the department who is the responsible appointee of the mayor, but the ordinance broke this chain of responsibility by placing the appointment of the deputy with the mayor. His duties shall then be determined by the commissioner, a condition that leads to a curious confusion of the source of tenure and determination of functions.

Among the various bureaus, that of engineering bears a pe-

culiar significance to the whole of the department. It is the initial bureau, and controls more largely the efficiency and results of the departmental administration than the remaining bureaus. Its technical nature has placed the office of engineer upon a professional basis.¹ The duties of the city engineer bring him into the most intimate relations with the work of the whole department. The work of the department of public works has fallen heavily upon the bureau of streets. The territorial expansion of the city has taxed the energy of this bureau and has led to rapid execution, rather than to well considered and matured plans of street improvement. The result has been excessive expenditure without corresponding results. The work of the bureau of streets has been relieved of much of the more important phases of street construction by converting the main avenues into boulevards and placing them under the jurisdiction of the park boards. The problem of street cleaning was originally under the control of this bureau, but by a recent ordinance this service has been erected into a separate bureau, and given an independent position.² This independence was so strongly expressed that the chief of the bureau was soon subordinated to the commissioner of the department instead of the mayor, as was the evident intention of the original ordinance.³ By provisions of the original ordinance the superintendent of street and alley cleaning possessed the power to form contracts, but this important discretionary function was transferred to the commissioner of public works, which further enforced the principle of the subordination of all services connected with the department.

The history of the present system of water supply of the city of Chicago begins with the act of April 15, 1873, which enabled the cities of the state to construct and to maintain their own sys-

¹The city engineer has been considered the logical successor of the head of the department.

²*Council Proceedings*, March 13, 1892.

³*Council Proceedings*, May 20, 1893.

tems. Previous to this act the water supply of Chicago was in the hands of quasi-public corporations under the control of the city authorities. By virtue of this act the city could begin necessary construction and could provide a special tax for that purpose. A separate fund was created to meet the expenses of the new service. The water fund and light tax was created by act of June 21, 1883. The "water fund tax" is levied by the council, and is a direct tax of one mill on the dollar upon the personal and real property. The problem of water supply of the city is closely connected with the problem of sewage and drainage. It has been doubly complicated by the fact that Lake Michigan is the place of sewage disposal and also of water supply. The solution of this problem led to the organization of the Chicago sanitary district, the results of which will be noted in another place.

The activity of the department of public work has been recently extended in the direction of municipal lighting and the control of the electric system of the city. The telegraph bureau has charge of the electrical appliances used in the various branches of the municipal service and possesses great opportunity of proving the feasibility of direct municipal control of electric lighting.

The history of the administration of the department of public work reflects the material growth and expansion of Chicago as would be visible in the work of no other department. While the most splendid achievement in the creation of the magnificent system of parks and boulevards has no connection with the city of Chicago, the less noticed work of public construction in streets and water and sewerage systems has developed the vitality and vigor of the department. In the midst of great difficulties its work has advanced with the rapid territorial expansion of the city, and while charges of ineffective expenditure and bad street construction may carry their weight of truth, this department at least does not stand alone in the charges of abuse brought against the city administration. Chicago may be the poorest

paved of the larger American municipalities, yet there is some apology for this condition of affairs in the fact that the city has been compelled to reconstruct its entire street surface since the great fire of 1871. The materials and methods of street structure had scarcely entered the stage of experimentation. The soil of the Chicago street was not well known. It is only recently that general attention has been given to the best kinds of street surface for the traffic that is to move over it. This is not a truth that is unique to the experience of Chicago, but is general in its application.

It is, however, significant that Chicago is able to point to a fact that does not often appear in the history of American municipal government. It is with considerable regret that the student of municipal conditions is compelled to appeal to the foreign city for examples of long and continued service of trained men, and to point to a developed and efficient administrative work closely identified with the career of one man. The public works department of Chicago furnishes at least one such an example. The development of this department is closely associated with the public career of Dewitt C. Cregier. His thirty-two years of close relation with the engineering phases of the departmental work links his name with the history of the vital period of public construction since 1872. Passing from a subordinate position he became the head of the department in 1882, and was instrumental in organizing it upon its present basis.¹ His advancement to the office of chief executive of the city establishes a line of promotion which has been unusual in the history of the American municipality.

¹ *Report of the Department of Public Works, for 1882.*

CHAPTER XIII.

INSTITUTIONS FOR PROTECTION AND EDUCATION.

The police, fire and sanitary administration differs essentially from the remaining administrative services in the fundamental fact that they are institutions for protection. They have in view the preservation of law and order as opposed to the destructive forces of immoral tendencies, and for the protection of the material work of other departments from destructive elements, as well as the protection of the citizen against the inroads of disease, issuing from unwholesome sanitary conditions. Great emphasis has been placed upon these phases of the activity of the American city to the exclusion of other work of a more creative character. The immoral conditions prevailing in a western municipality have necessitated an efficient and vigorous constabulary and fire departments, until they have absorbed public attention and have furnished the standards for measuring the efficiency and the vigor of the whole city administration.

Police.

The police power is a state function. It is military in its character and issues logically from state executive authority, preserving theoretically the organic connection between the state and the municipality. The great police problems of the state center in the city, and this has led to the close relation of the police system of the larger municipalities with the executive authorities of the state. This connection has been principally established by control over the appointment of the chief police officers and boards, and in a partial separation of police interests from the control of the municipality. The courts have tended to confirm this position. In the police system of

the larger European cities this distinction is clearly made, leaving to the locality its police whose functions are non-political. This separation has not followed in Chicago, but its police power resides ultimately with the council.¹ It regulates the police of the city, and issues the necessary police ordinances. This broad grant of powers would seem to indicate an unqualified control of the council over the police administration, but this power assumes the form of legislation while the governor of the state possesses contingent control, and the charter has conferred substantial obligations upon the mayor and chief of police. The courts have held that this grant of legislative power is incident to regulation, and carries with it arbitrary power in the closing of certain businesses, and in the regulation of traffic and labor on Sundays.² The courts have tended to strengthen this charter grant to the council in all matters of police legislation, and have confirmed its authority over police regulation and control.³ Police organization is delegated to the council as the central fact in the municipality.

The territorial jurisdiction of police passes beyond that of the city and is coterminous with Cook county.⁴ But for current administrative purposes the police area is more limited. Specific police regulation is made effective, and danger is prevented by encircling the municipality with a territorial belt into which police authority may be extended as contingencies arise. Current police jurisdiction, then, ends with the territorial limits of the city. The growth and elaboration of the police service measures the intensity of the municipal organization. The city of Chicago, by its position, commercial importance, and unprecedented growth, has been called to consider police problems of a serious nature. Elements of disorder have been constantly struggling to assert themselves.

The charter law of 1872 commits the council to no definite

¹Sheridan vs. Colvin, 78 Ill., 237.

²Chebanse vs. M'Pherson, 15 App., 311; also 114 Ill., 49.

³Ibid.

⁴Law of May 13, 1887.

system of police organization. The police board passed away during the period of departmental reconstruction, and a superintendent of police was substituted as the responsible administrative head. The superintendent of police controls the service of his department under the civil service law of 1895.¹ The service is by this act placed upon a different personal relation with the superintendent than in the period when the entire qualifications were political.

The police administration is closely connected with the whole administration of the city. It stands upon a basis of assistance to the remaining departments in the enforcement of all regulations of a police character. Particularly the health, fire and public work administration make heavy demands upon the police force. In extreme cases the patrol service has been employed in the distribution of relief funds provided by the privately organized charities of the city. With its efficiently equipped ambulance service, timely assistance is afforded the hospital work. An interesting village survival appears in the mayor's police, who cannot exceed four in number and who shall "look after and prosecute any persons who shall vend or dispose of any article" before obtaining the proper permit.

By the ordinance of December 4, 1882, a branch of police service was instituted which possesses some possibilities in an important field of work. The mayor is directed to provide such police division stations as he may deem necessary with a matron to supervise the wants of female prisoners.

The work of the Chicago police administration in the regulation and control of the varied, transient and conflicting forces of an expanding and heterogeneous community has been one of peculiar difficulty. Control of such conditions must be attended with imperfect results, yet as a rule a fair basis of efficiency has characterized the police administration of the city.

¹The personnel of the police service is coming rapidly under the provisions of the act of 1895. On March 21, 1898, the entire police service, with the exception of the lieutenants, were placed on a civil service basis.

It must, however, be noted that there has been no serious attempt to differentiate the police service according to the nature of the work to be done. Differentiation has been largely mechanical and not with due regard to the nature of the material of police administration. A better and more efficient service would result from the use of a more scientific basis of police classification and differentiation. The social structure of the city indicates the localization of police problems. Disorderly elements seek specific quarters of the city and lead to special police areas. This affords the territorial basis of classification ordinarily employed. The special police area for the disorderly element leads to more definite control, but does not afford the most efficient and permanent results when applied to the whole police administration. A more pliable principle for the classification of police functions is to be found in the nature of the problems of police administration. This principle is employed by the best foreign municipal police systems. In the policing of a large city there are two tolerably clear fields which require two bodies of men of different temperament and training. These fields of work in their intensive nature tend to assume a territorial basis. The first, if not the most important, function of the police is directly concerned with the regulation of the open street traffic and the protection of the person and property of the citizen from violence and destruction. For purposes of convenience these may be designated watch or political police. Their duties extend to the larger questions of maintenance of order in the current life of the city. Their work ends in the protection of that which already exists.

A second category of police services takes a more creative view of the use of the police power, and does not stop with the mere readiness to provide protection for the person and property of the citizen, but seeks to create conditions through inspection and control of sanitary conditions and of the immoral influences that threaten the community with subtler dangers than open physical violence and crime. The character of this

work with the developed position of inspection and sanitation demands a body of trained men. This branch of the police service would become an efficient auxiliary of the general administration, and would tend to economize the service of the city, by rendering it more vigorous through simplification. Furthermore, the police service of the city is not thoroughly consolidated, but bears the impress of town governments where the constables are elected by the people.¹

The police administration of Chicago is creditable and efficient, yet it suffers by the absence of a consolidated system built upon a thorough basis of classified functions.

Fire Administration.

The history of the Chicago fire department is unique and instructive. It has passed through all the stages incident to the fire administration of most cities, from the primitive volunteer system to that of a completely organized department of the municipality. During the days of the volunteer service it became the place of refuge for a floating, shiftless class, too often of a criminal tendency, which brought excessive abuses into the administration. These conditions gradually enforced stricter municipal control, as the fire dangers of a modern city increased, until the conflagration of 1871 swept away the greater portion of the existing city.

The charter law of 1872 brought reorganization to the fire department, with the council as the central organ of control. The executive head of the department is the fire marshal, who has "sole and absolute" charge of its administration, and who bears the authority to organize and to discipline the service. The fire administration of Chicago is one of recognized efficiency. The aids of modern invention have been freely used to facilitate rapid and effective concentration of the service. Operating within a territory of such wide extent, the demands of the department will be much lessened by a vigorous enforce-

¹Gage, Administration of Chicago, *Open Court*, April, 1897.

ment of efficient building regulations and control over the location of factories. The absence of the proper regulation of these matters has proved a costly negligence to Chicago, in the vast expenditure necessary to maintain a system of such vigor and energy. The department has become a model of organization, equipment and energy, and has been sought out as such by the municipalities of both continents. A further consideration of the organic phase of the fire administration would incorporate details foreign to an outline treatment.

Police and Fire Fund.

Following the reorganization of the police and fire departments, a series of acts have provided protection to the personnel of the service and their families by organizing a fund available under certain contingencies. These funds are so united as to bring the two departments into closer relation and sympathy. The element of personal danger and sacrifice is so clearly a part of the police and fire service that they become a unifying force, that brings these services into more than a mechanical relation which so characterizes that of the other administrative departments. Personal fidelity in the midst of peculiar and imminent dangers is stimulated by social legislation touching the police and fire services.

Previous to the organization of the funds some scattering legislation had provided incidental protection to each department, but these were revised and incorporated in the act of May 24, 1877, and the amending act of May 10, 1879. This repealed all charter provisions touching the building of the funds from insurance rates.¹ The close relation of insurance rates to these services do not embody a new fact; it is historic. The fire departments upon their voluntary basis were largely supported by insurance companies, not only in Chicago but elsewhere. This fact accounts for the close relation of the municipal revenues derived from insurance rates to the fund attached

¹Benevolent Association vs. Farwell, 100 Ill., 199.

to the police and fire departments. It is a lingering survival of the volunteer principle. The relief fund for disabled police and firemen was organized upon its present basis by the act of June 23, 1883. This fund possesses its definite sources of revenue, which are drawn mainly from those business interests that desire a stable and efficient fire and police service. The most important source of the relief fund is one-half of all the rates, taxes, licenses, fees paid by the insurance companies to the city treasury; to this is added one-fourth of all the dog taxes; all the fines imposed upon the members of the two departments; and finally all the moneys derived from the sale of unclaimed and stolen property. The revenue flowing from these sources is steady and certain, and affords an ample basis for the relief of those entitled to its benefits. The administration of the fund is controlled by a board of trustees, composed of the principal administrative officers of the departments concerned, and of the officers of the city. Its membership is made up of the mayor, superintendent of police, chief of fire department, chairmen of the council's committees on police, fire and water, the city comptroller and city treasurer. This board possesses exclusive control and administration of the relief fund. By the act of May 10, 1879, the beneficiaries of the fund are determined by the board. In general the beneficiaries are the members of the two forces who have seen constant service for a period of ten years. Injury is made the basis of distributing the benefits of the fund. Permanent disability entitles the settlement of six hundred dollars upon the widow, or a child under sixteen years. The relief fund, therefore, assumes the form of an insurance, and is in no manner connected with discharge, or old age. Provision was made for a system of pension covering this phase of disability by the act of April 29, 1887, which authorized cities with a population of 50,000 to create and maintain a police pension fund. During the same session of the legislature a firemen's pension fund was provided for the same class of cities with a paid

fire department. These acts are parallel.¹ Definite sources of revenue are set apart for each fund and the manner of administration is similar. The principle of identity of interest is employed in determining the nature of the source of these funds, by setting apart those sources that would stimulate an active interest in the execution of the city ordinances and the suppression of certain vices. The organization of the boards in the control of the administration of the pension funds is essentially the same as the board in charge of the relief fund with some change in the personnel. The beneficiaries of the police fund must have served the city for a period of twenty years and have reached the age of fifty years, when retirement or disability entitles a member of the police force to a pension of one-half the amount of his salary.

The act creating the firemen's pension fund permits the accumulation of \$200,000, the income of which shall be devoted to the purposes of the fund. The beneficiaries of the firemen's fund include those persons who have retired after twenty-two years of service upon an amount equal to one-half of their salary at the time of retirement.

This series of acts opens up a fruitful field for municipal legislation, and affords an easy transition to the principle and practice of civil pensions for the entire municipal service. Although the element of personal danger associated with the fire and police services is obviously the controlling motive in this system of municipal pensions, the struggle for permanency of service with a lessened salary has, in foreign cities, and will doubtless in the American cities, extend the civil pension to many branches of the municipal service. Permanency of tenure, protected by a careful recognition of civil service rules, affords a natural step toward the recognition of civil pensions as a means in economizing municipal salaries. The civil pension has no hold upon the

¹Police Pension Fund act of April 29, 1887; Firemen's Pension Fund act of May 13, 1887.

American municipality. We have demanded no technical training and have given no essential guarantee to a permanent tenure, two fundamental facts, in the development of a system of civil pensions.

Health Administration.

The modern city has become absorbingly interested in sanitary problems. The chosen dwelling place of so large a percentage of the population of the modern state, the unsanitary conditions that generally prevailed, have been a constant menace to the health and pleasure, not only to the citizens of a particular city, but to society at large. The discoveries of science in the treatment of disease germs have enabled the municipality to cope with conditions that have so seriously threatened the life of its citizens. It is obvious that the serious phases of sanitation are local, and grow mainly from the geology of the city, increased or lessened by the structure of the buildings and other material constructions. The comparatively low levels prevailing in Chicago, and the rapidity of the city's expansion in territory and population has brought to the sanitary administration problems of the severest nature. But with an effort that is unparalleled in the history of local sanitation the people of Chicago and the surrounding suburbs have seized upon conditions and embodied their results in the form of the drainage canal. The relation of the drainage canal to the sanitation of the city will be reserved for later consideration, but the more direct internal health administration undertaken by the municipality must first be outlined.

In sanitary administration, the safety of the public health is the only standard. The grant of important powers to the council is thus anticipated in the nature of the sanitary problems and conditions prevailing in the city. Wide and ample provisions for the solution of those problems have been liberally construed by the courts.¹ The subject matter of the health administration

¹Kingsley vs. Chicago, 124 Ill., 360.

pertains to all questions promoting the public health. The history of the organization of the health administration in England and the United States points to the board as the favored type. This condition is doubtless due to the consultative element in the solution of these questions and the necessary consensus of expert opinion. The work of sanitation is so closely a police function, and although its problems are local in their setting, they become so general in their consequences, that the subordination of the local health administration should be made over to the central administrative authority in the interests of a more efficient and sanitary regulation. Chicago, however, offers an exception to the board type of organization. The board of health was replaced by the commissioner of health in the period of departmental reorganization. The remains of the consultative feature of the old board is preserved in associating with the commissioner, the superintendent of police, and the city physician. This establishes the organic relation between the health and police administration, and suggests the classification of police functions so that the execution of the orders of the commissioner of health shall be undertaken by the sanitary police of the regular police department. The duties and powers of the commissioner are summed up in the phrase, public health, and extends from professional advice and information to the forceable entry of drains and sewers, at any time from "the rising to the setting of the sun."

Disease and crime dwell with dirt and foulness. The localization of these menacing and destructive elements is one factor in their control, but often diffusion becomes a necessary step in the solution of these problems. "Dubious districts" gather poisoned elements that start destructive tendencies in the more orderly districts. They become a patent menace to the health and morals of the city. Chicago possesses no distinctively slum quarters, but districts are present that demand the energy and vigilance of an efficient health administration. Public health bears so intimate a relation to the problem of street

cleaning, garbage, and effective police administration that no adequate results are attainable until these services are effectively co-ordinated and developed. Many services may, by nature, fall under the jurisdiction of two or more departments. Previous to 1893, the scavenger work of the city was removed from the jurisdiction of the health department and transferred to the department of public work.¹ Doubtless the element of contract, as well as other administrative considerations, was a controlling argument in this transfer. This frees the health commissioner from great financial responsibilities, but in no manner releases him from the care of the inspection, and enforcement of the removal of the street garbage. The activity of the department in other directions extends until its work of inspection reaches the social and economic life of the citizen. Health is made the motive of this control. The sweater's business is made the subject of control by a recent ordinance. The ordinance defines the work-shop as a place for making and repairing goods for wear, and includes certain other articles. The open object of the ordinance is the cleanliness and regulation of these places, and if properly enforced enables the removal of the worst external features of the sweating system. Under the jurisdiction of the commissioner of health has been brought the regulation of child labor.² This legislation supplements the compulsory school law of the state by exempting all children of 14 years from factory labor. These two ordinances, concerned with the regulation of work-shops and child labor, have a wider significance than the problem of sanitation, and they commit the council to a line of legislation that will strengthen its control over such matters of social and economic importance.

Food inspection in the Anglo-American city is not considered as a serious need when viewed from its active administration. Many ordinances have followed in attempts to institute a con-

¹ *Council Proceedings*, March 13, 1893.

² *Council Proceedings*, Ordinance of June 26, 1890.

trol over the adulteration of foods and the prohibition of diseased meats from the markets, but the inspection has been inadequate to meet the demands of the problem. More recent interest has followed the advance in bacteriological studies in their tracing of sickness to careless food inspection. Unquestionably the most fruitful source of food adulteration is associated with the sale of milk. The abuse became so alarming in Chicago that a special "milk division" was organized for the testing and control of this particular food.¹ The health administration presents some traces of an illogical application of the theory of executive concentration. At least two important exceptions appeared in the appointment of the chiefs of the milk division and the city physician, both of whom are named by the mayor, a method of appointment that breaks the chain of executive responsibility as it is worked out in the other administrative departments. However, this illogical view was partially corrected by a later ordinance, which abolished the office of deputy commissioner of health, who had charge of the milk division and subordinated it to the authority of the health commissioner.²

It will be observed that the active interest in many of the more important phases of sanitary administration falls within recent years. Municipal sanitary science has assumed its importance in the last quarter of a century. Upon the completion of the drainage canal, the city of Chicago will have taken the most important step in its relief from unwholesome conditions in the history of any modern municipality.

School Administration.

The school administration of the American states is traditionally a local function. The state has, however, organized the school system according to a general plan, and recent legislation has tended to establish closer relations with central authority.

¹ *Council Proceedings*, Ordinance, November 21, 1892.

² *Council Proceedings*, Ordinance October 2, 1893.

The school administration has been considered special and apart from the ordinary administrative activity of the local unit, due in the Middle West to the peculiar relation of the public domain to the schools as a source of revenue, as well as to the territorial basis of their administration. These facts bore their fruit in Chicago, and in the transition from the rural system of administration to that of the urban system, the school section and the rural type of organization projected their lingering traces into village and urban conditions.

The present status of the school system of the state of Illinois rests upon the act of May 21, 1889. The law recognizes three grades of schools, and provides each with its individual organization. The basis of classification is that of population. The board type of an organization is strictly adhered to although the source of tenure is both elective and appointive. Chicago stands in the category separate from the above divisions of the school system. The administrative identity of the schools with the municipality has been the result of a slow process. The law of 1889 separated the Chicago system from the third class on the basis of tenure of the board of education. The school board of the cities of the third class is appointed by the governor with the consent of the council. The Chicago board is named by the mayor with the consent of the council. Two facts establish a close control of the city over the school administration. The first lies in the appointment of the board of education and its confirmation by the council; the second fact appears in the financial relation of the council to the board. The annual budget of the school board must be voted by the council, and subjected to the financial veto of the mayor. Administratively, the board is subjected in no manner to the authority of the council or the mayor, but in the facts above noted the city may exercise a controlling influence over the policy of the school board. The powers of the board are directly delegated by the legislature. The ordinances of the council are thus excluded from the regulation of the school administration only in so far as affected by

the annual budget. The powers of the board extend to all matters of school administration in material equipment and employment of instructional force. The efficiency of the school administration is largely dependent upon the financial attitude of the council.

CHAPTER XIV.

TOWN AND COUNTY GOVERNMENT IN CHICAGO.

The founding and history of local government in the West are not isolated phenomena, but they must be treated as one stage in the evolution of local institutional life begun in the earlier centuries of English history. Three facts are fundamentally associated with the planting of local administrative institutions in the Northwest Territory. The first is related to their legal form and structure provided by the Ordinances of 1785 and 1787; the second to the physiographic features of the section; the third pertains to the character, and to the local administrative and political education of the settlers.

Local units were not created by the Ordinances of 1785 and 1787, but they rather provided certain possibilities of choice on the part of the settlers. The Ordinances were the outcome of a congressional compromise, which permitted the development of the system of local institutions that prevails throughout the Middle West. The force of physical environment suggested then the adaptation of a local institutional organization to broad territories and sparseness of population, which would combine effectively these scattered factors into some unit of control for local administrative purposes. The Middle West was peopled in order and system; its valleys and prairies were fructified, not by inundations of population, but by well marked streams and movements which were started across the continent, and which bore on their currents the traditions, customs, and local institutional practices of their Eastern sources. Into the valleys and prairies of the Northwest flowed two characteristic streams of tendencies, which were later destined to test their strength in those states that lay across their channel. The first was com-

posed of elements from the South and Middle sections of the East. It came down the Ohio valley, into Kentucky, Southern Ohio, Indiana, and Illinois, organizing those territories and admitting them as states as early as 1818. Pennsylvania and Virginia tendencies predominated.

The second stream was constituted largely of New England settlers and, recruited as it passed up the valley of the Mohawk by settlers from New York, moved into northern Ohio, followed the southern shores of the lakes into Michigan about the year that Illinois was admitted as a state. Had these two movements affected separate territories alone, the planting of local institutions would have slowly modified, in a new environment the forms of their eastern homes. But these states lay directly across these currents, and prepared the way for one of the most interesting and instructive struggles for the maintenance of local types in the whole range of American administrative history.

The location of the state of Illinois affords a typical illustration of the struggle that resulted from mingling of the two streams of tendencies and political traditions, flowing from the two sections of the East. The settler from New England and New York found the state organized with the county as the only unit of general local administration, with the school district as a growing vital fact of the local life of the people. From the point of view of the settlers, fresh from the little communities of New England, the town-meeting was the only effective organ of local administration. The clash of New England and Southern ideas upon this question was inevitable. The representatives of each section were prepared to defend that type which they had learned and believed to be efficient. Illinois territory was entered from the South, principally by the men of Virginia and Pennsylvania. They framed the state constitution in 1818, and planted the Pennsylvania three-commissioner county system. In Illinois, the Ordinances of 1785 and 1787 bore especial fruit. The congressional township as a result of the Ordinance of 1785 became the unit of school administration. "As the New Eng-

land township life grew up around the church, so Western localism finds its nucleus in the school system."¹ The school township, so vital in its nature, slowly became the basis of other administrative services. Chicago was the gateway to the northern portions of the state, and its rapid growth after 1833, points to the vigor and rapidity with which the New England element passed into the possession of these lands. These settlers could not readily adapt themselves to the county system already established. The agitation was an important factor that led to the constitutional convention of 1847. The result of the work of this convention was the recognition of New England's cherished institution—the town meeting. It was a compromise constitution on the question of local administration. Upon the centralized Pennsylvania county was grafted this democratic institution of New England. The new constitution of the state required a general township law, referring the question of its adoption to the people of each county. The location of New England sentiment is shown in the rapidity with which northern counties of the state availed themselves of the law, while the strongholds of southern sentiment have been gradually invaded until the township with its town meeting prevails in all parts of the state, with the exception of a few of the extreme southern counties. The constitutional revision of 1848 was the outcome of a struggle on Illinois soil, for the perpetuity of local institutions understood and valued by men of New England and the South.

The essential structure of the local administrative system of Illinois has changed but little since the constitution of 1848. The most radical change has been in the substitution in the county, of the New York supervisor system for the Pennsylvania three-commissioner system—a further triumph of northern ideas and types of local organization. Viewed by the best standards of administrative criticism, this system is the most effective

¹Shaw, in *Johns Hopkins University Studies*, I., 10.

and advanced type yet developed by American experience to meet the demands of local rural administration.¹

The importance of this brief outline of the founding of local rural institutions in Illinois, lies in the fact that the county-town government still plays an important role in the administration of the city of Chicago. The county is the principal unit in the local system, while the township performs important functions under the county supervision. The laws which pertain to the organization of the state are uniform with the exception of Cook county. The Constitution provides that Cook county shall be governed by a board of county commissioners,² which is a modified form of the New York supervisor system which prevails in those counties with the township system. The mingling of rural and urban elements upon a representative basis has led to this modification of Cook county. The constitution relieved the legislature of the task of constructing the Cook county board by explicitly outlining its constituted parts. The importance of the urban elements appears in the fact that the city possesses ten members of the board of commissioners, while rural representation is no more than five.³ This is an open recognition that the interests of Cook county are emphatically urban. The powers lodged with the board of commissioners are those of the other counties of the state with additional provisions.

The board exercises both legislative and administrative functions. Its powers, however, are essentially confined to the control of the administrative machinery of finance. It is the organ of tax apportionment among the several towns, which levy and collect the revenues according to the provisions of the county orders. The expenditures of the county are confined mainly to the care of the poor, and to the maintenance of the county machinery for tax supervision and control.

Recent legislation has tended to make the Cook county board

¹Howard, *Local Constitutional History*, p. 438.

²Constitution of 1870, Art. 10, Sec. 7.

³Ibid.

of commissioners still more exceptional in its organization.¹ Its powers have been extended, and the term of its tenure of its members changed to two years, with the important administrative provision, that the elector shall designate on his ballot a person who shall serve as president of the board. In the creation of the office of president of the county board, we have an interesting and unique application of the principle of executive checks upon the legislative power of the commissioners. In the sessions of the board, the president possesses no tie vote, but is permitted to cast a regular ballot as the representative of his constituency. But in addition to this regular vote, he possesses a further control over the county legislation through the special right of veto. This veto power assumes the form of a special financial veto and reaches the separate items of the appropriation bill. The veto is not absolute, but is protected by the formidable strength of four-fifths of the board with an aye and nay vote.

The changes provided by the act of 1893 are concerned essentially with the financial powers of the commissioners. In addition to the checks, instituted by the financial veto, the board cannot delegate its powers to a committee when such power involves the expenditure of \$500; furthermore, the expenditure of sums above that amount, must receive the sanction of a two-thirds vote of the board; and still further, the commissioners were asked to provide an annual appropriation bill with a full and specific statement of the objects and ends of expenditure, and that no other appropriations can be passed during the fiscal year except by a four-fifths vote. The law further provides a special committee upon finance and public service. The superintendent of public service is appointed by the board, with the consent of its president, and is charged with the purchase and distribution of county supplies. It then appears that publicity, system, and responsibility, were primary aims sought by the act of 1893. The business of the county centers in its board

¹ Act of June 15, 1893, for Cook county.

and the remaining county officials possess few discretionary powers, since the policies dominating the county administration are outlined by the commissioners.

Previous to the passage of the Civil Service law of the state,¹ the appointment of the county civil service was lodged with the president of the board. In accordance with the provisions of this act three commissioners are appointed by the president with the powers outlined by the Civil Service act of 1895. The civil service of the county is one of the most important negative reasons for the existence of the county government in the municipal area of Chicago. The most important business of the county, except in the supervision of revenue collection, is that of the care of the poor. This is an evident weakness in the position of this rural unit in the city, since the problems of charity are urban. Furthermore, the county does not reach the real problems of charity, as is evidenced by the active private philanthropy in the form of organized charities which stand in closer relation to the city authorities than to those of the county.

A conception of the nature of the rural machinery operating in Chicago is not complete without an outline of the township organization. The persistence of rural types of local organization in the midst of urban conditions is emphasized in the presence of the towns within the city area. The central fact in the town government in Illinois is the old New England town meeting, the creation of the constitution of 1848. But New England has abundantly demonstrated the uselessness of its cherished democratic institution in coping with the problems of the larger urban centers.² Designed for small areas of limited population, it remains a useless appendage in the thickly populated towns of Chicago, and serves as an effective instrument in the concealment of many questionable acts, under the garb of popular approval. The town meeting is the legislative organ of the township, and may exercise a full control over the town business.

¹Act of June 26, 1895.

²Boston abolished the town-meeting by the charter of 1822.

The laws of the state impose special financial limitations upon the town meeting within the area of incorporated cities. In these cities it cannot raise money by taxation, but the county board assumes the exercise of this power. The town meeting is then reduced to an assembly for the election of town officers. These present a vast array of local offices, as supervisor, clerk, assessor, collector, justice of peace, constable, etc. The population of the townships of Chicago multiplies these offices and sinecures to a needless extent. The administrative importance of the towns lies in their relation to the machinery of revenue. It is the active unit in the state machinery of taxation for the assessment and collection of all direct revenues, both state and local, levied upon personal and real values, with the exception of railroad property and its rolling stock. The relation of the town to the city is thus of vital importance. The point of contact between the two systems is the ordinance of the council providing for the appropriation of funds for the current expenses of administration.¹ This specified statement is filed with the county clerk, who ascertains the rate of per cent. necessary to produce the amount appropriated by the city, and issues his orders to the town assessors and collectors. The manner of collecting is identical with that of the county and state taxes. The whole question of valuation lies practically with the town assessors, the only remedy provided by law being the towns and county boards of equalization.² The city is powerless in the valuation of its taxable property and in the collection of its direct revenues. The towns, in the administration of assessments and collections, afford the only point at which all various administrative interests of the locality meet. In the town machinery center the sources of the weakness and abuses prevailing in the administration of the finances of Chicago. It remains an undisputed fact that the town assessors are either powerless to return correct valuation lists, or that they are willing

¹Law of April 15, 1872. Art VIII., 1.

²See Appendix.

tools of corrupting influences. It is openly asserted, and scarcely disputed, that the assessors are competing officials in the return of low values, and are elected for that purpose. The assessment of direct taxes then becomes a menace to order and good administration. The town assessor determines the valuation which never approaches the cash value; but is, on the contrary, but a small per cent. of the real value of the property. After assessment lists are prepared they pass under review by the town board, and are further reviewed and equalized between the towns by the county board of equalization, and between the counties of the state by the state board. The work of the local boards is universally recognized as of the most inefficient and farcial nature. The powers lodged with the board are exercised only in a limited manner and never to correct the low assessments of the town authorities. The result of this open and direct mal-administration is inadequate revenue for the city, which forces it to resort to supplementary and indirect revenues in order to meet the expenses of the current administration. Competitive assessments has led to inequality in taxation and to under valuation. Corruption is encouraged by lax enforcement of existing laws, which stands as an open menace to public morality.

CHAPTER XV.

THE PARK ADMINISTRATION.

Reference has already been made to the tendency of the American state legislatures to create within the municipal area other administrative institutions endowed with limited municipal functions, and subjected in many instances to no control by the city in whose territory they are organized. New problems, incident to urban centers, have demanded revenues beyond the taxing power of the municipality, and at the same time the territorial significance of these problems has been broader than the limits of the municipal corporation. A further contributing factor in the rise of the administrative boards, not controlled by the regular city authorities, is obviously a general public distrust with the management of affairs by the city, and the general charter weakness in matters of taxation especially. To escape these weaknesses and abuses new areas have been created with their governing bodies, and their independent powers of taxation, to meet new problems that demanded excessive expenditures and careful administration. This fact has characterized Anglo-American local administration and has inaugurated a system of administrative diffusion, rather than one of simplification and consolidation. Administrative waste must necessarily characterize such disorganization, which has resulted from the superimposing of new areas upon those already existing, without due regard to the factor of control or that of the duplication of organs, where those already constituted might efficiently perform the work. A chaos of administrative areas and authorities has been the result in many of our localities, and especially our cities.

Chicago presents an interesting instance of duplication of ad-

ministrative organs and confusion of administrative areas. Limited financial power granted by the charter has been one important factor in the creation of quasi-public bodies to carry on phases of the administrative work, that should be logically performed by the regular city authorities. In the earlier history of the municipality, the existence of the special boards for the administration of particular problems was noted, and how these services gradually became integral elements of the later municipal organization. The relation of these services, however, did not involve the special administrative area, nor were they entirely severed from the municipal control.

The park administration of Chicago in its more important phases bears no administrative relation to the municipality. The tendency has been to transfer to the park boards, the entire park system and the connecting boulevards, which transfer has taken from the city an important factor in stimulating public interest in the current administration. The citizen observes the park boards providing him pleasure and beautifying his city by the construction of vast parks and magnificent boulevards. This separation has been, without question, an important element in divorcing public interest in the regular municipal administration.

The park boards of Chicago must be treated as separate municipal institutions. Recent decisions of the courts seem clearly to establish the claim of the park boards to this position.¹ This case grew out of an effort of the city to levy a tax upon the real estate embraced within the jurisdiction of the park boards. The assessment was for the purpose of improving the adjacent streets. In reviewing the case the court took occasion to define the nature of the park districts and their general legal relation to the city of Chicago. The court held that the West Chicago park commissioners are a municipal corporation, created for the purpose of laying out, establishing, improving and maintaining certain parks and boulevards within the territorial limits of the city of Chicago; and that they are given full and exclusive

¹West Park Com. vs. Chicago, 152 Ill., 392.

power and authority, not only to lay out and improve, but also to govern, regulate, manage, control and direct the administration of these parks; and, that furthermore, their power and authority in this respect are plenary and exclusive of the corporation of Chicago. This raises the question as to whether the park boards are full municipal corporations. The earlier cases had considered them as quasi-municipal corporations.¹ But the question of limitation of powers does not invalidate the corporate standing of the park boards; this being a matter of legislative discretion. The municipal corporation is limited in powers and territory, and two bodies created by the legislature should not operate within the same territory with reference to the same subject matter.

Since the park boards were operating within the territory of Chicago, the basis of separation must be one of subject matter. The park boards, as full municipal corporations, possess full jurisdiction over the parks and boulevards of their districts, with exclusive right of assessment of the taxable property for purposes of street improvement. The city possesses a jurisdiction over the park property, but within the provisions of the law organizing the park boards, the latter are independent of the powers of the city. The conclusion of the court is that the city and park commissioners are two co-equal, independent municipalities, each vested with exclusive jurisdiction over public grounds for specifically stated purposes. The position of the court that the city of Chicago possesses no legal right to enjoy the revenues flowing from the property within the park districts for street improvements is not based upon the ground of no benefit, but rather of want of administrative jurisdiction for improvement purposes. At this point it may be inquired whether legislation has not changed the nature of authority so as to divorce it from the public spirit which would compel the community as a whole to participate in the burdens of park administration and not the people of the park areas alone. The im-

¹Champaign vs. Harman, 98 Ill., 491.

portance of this decision is the interpretation of the exact relation of the park boards to the city of Chicago from an administrative point of view. And in this relation they are administratively independent for purposes of park administration.

The park boards of Chicago received their organization previous to the adoption of the charter of 1872. The park areas are a natural, logical product of the physiographic features of the city, and the three park systems correspond to the three "natural divisions" which have so clearly modified and determined many phases of the administrative organization of the city.

The powers of the park boards, like all municipalities, are special as to territory and subject matter. The jurisdiction of the common council over the streets, parks and public places is inclusive and extends to all phases of public construction and maintenance of streets, etc., not expressly delegated to other bodies. Special legislation has enabled the municipality to escape the more costly phases of this work by the creation of the park system. Over the construction and maintenance of this system the municipality possesses no power whatever. The park areas are tax-gathering and expending areas for park purposes. Several legislative acts have facilitated the consolidation of the several towns in and near Chicago into park administrative areas with full powers of taxation for park purposes.¹ Later acts have enabled the city council to transfer any public ground to one of the boards for administrative purposes.² The transfers affected by these acts are conditioned by two restrictions: the consent of the city council and park commission, and that of a majority of property owners. This two-fold division of city and park jurisdictions enables the separation of the streets and parks upon the basis of traffic and pleasure. The parks represent that

¹West Park act of February 27, 1869; South Park act, February 24, 1869.

²Act of April 11, 1885. Recent transfer of Lake Front to South Park Commissioners under this act.

phase of public works concerned with the pleasure of the citizen and the embellishment and beauty of those streets and thoroughfares not designed for heavy traffic. The power of transfer is unlimited, depending wholly upon the attitude of the city and the park commissioners and property owners. A later act strengthened this power to set apart certain streets for pleasure and the recreation of the citizen and to protect them accordingly.¹

The type of organization is general for the three park systems. In fact, the plan is general for the whole state. The South park system of Chicago was organized before the legislature had made general provisions for the park administration of the whole state. The first legislative act upon the question of park organization in accordance with the provisions of the constitution of 1870 was the act of June 16, 1871. The purpose of this act was consolidation. It was engaged in the task of reducing legislation to one single organic law for the state. All park boards of commissioners were made corporate authorities and quasi-municipal corporations for park purposes.² In accordance with the principle of financial control established over the localities, the county board of supervisors through the towns attend to matters of taxation.

The relation of the park boards to the county is essentially the same as that of the city of Chicago. The towns assess, equalize, and collect the amounts levied by the park boards. The park commissioners are thus empowered to levy, collect, and expend the funds necessary for the construction and maintenance of the park system. Their power does not stop at this point, but extends to the appointment and support of a park patrol, and to the general management of the park administration.

The members of the park boards receive their appointments from the governor of the state for a period of five years. Pre-

¹Act of March 27, 1889.

²*Kedsie vs. West Chicago Park Commission*; also, *West Park Commission vs. Chicago*, 152 Ill., 392.

vious to this provision, the park commissions had been named by the judges of the circuit court. It must be noted that the park administration is in no sense within the control of the locality except in ordinary judicial procedure. The only element of popular control appears in the election of the governor of the state, which results in the elimination of any effective control on the part of the public. The result is that the park boards are removed from the power of the suffrage, and still, they have proved a popular phase of the Chicago administration. The courts were restrained from exercising this executive function and removed the appointment of the park commissioners from the control of the locality.¹ The abuses of local political methods are eliminated except as they operate in the election of the governor and influence his appointments. On the whole, better appointments should result where the source of tenure is removed from the petty bickerings of local politicians; and experience has shown that the appointment of the park boards of Chicago has been uniformly good, and has enrolled in their membership many of the most active supporters of the best interests of local administration. Furthermore, the office is honorary, no salary being attached, and only the item of personal expense is met by the public. The honor is the salary. The fact that the removal of the source of tenure from the body of the suffrage, and that the creation of the position of park commissioner as an honor office, should be associated with the best results in the administration of Chicago is certainly significant. The exact reasons why the governor should appoint the park boards of the state and not the regular municipal officers, would doubtless prove a difficult matter for the friends of state appointment to formulate. The parks are local and have no closer relation to the general state administration than the remaining localities. The obvious reason of central appointment was the removal of the park boards from the direct control of the popular will, and local politics. It is a centralizing tendency, which

¹Act of May 30, 1881.

has increased enormously the appointing power of the governor in a field where its administrative sanction could be justly questioned, although the practical result of the administration have been most efficient. Recent legislation has modified the source of tenure for the park boards to be organized in the future, providing for their election by the people.¹ This places the park administration upon a completely popular basis, but in no manner affects the park areas of Chicago. The areas of taxation for park purposes is theoretically confined to the town, but the courts have held that a park tax is not illegal because it affects an adjoining town. The power of indebtedness is fixed at five per cent. of aggregate valuation of all property subject to a park tax; while the maximum limit of taxation was placed at two and one-half mills on the dollar.² A later act empowered a town coterminous with the park limits to issue bonds to the amount of \$1,000,000 for the maintenance and improvement of the park.³ The active interest in the park administration has led to the increase of the financial powers of the park commissioners. The park tax levy has been increased,⁴ and improvement taxes have been enlarged.⁵ These measures were the outgrowth of the active work of construction outlined by the park boards of the larger cities of the state, particularly of Chicago.

The last quarter of a century has inaugurated a brilliant era in park administration in all countries where urban life has been most active. The result of the administration of the park boards of Chicago is one of especial pride. The attractiveness and extent of its parks and boulevards are scarcely surpassed in any modern municipality. In the midst of conditions little assisted by natural beauty, there has arisen this system of pleasure grounds and drives and boulevards that circle the city; and

¹ Act of June 24, 1895.

² Act of May 2, 1873.

³ Act of June 12, 1891.

⁴ Act of June 7, 1895.

⁵ Act of June 24, 1895.

the crowning work of this brilliant era is near at hand in the creation of a park of magnificent proportions to be planted in the waters of Lake Michigan, and in the conversion of uninviting shores into pleasure grounds of health and beauty. No single phase of the Chicago administration receives the vigorous support of public sentiment as the park administration, and its brilliant history has doubtless been a strong factor in leveling at the administration of the city itself much adverse and bitter criticism. The park boards have developed valuable experiences in the matters of direct public construction and in the development of full equipments for a complete system of park administration. Vigor, foresight, and efficiency characterize the work of the commissioners, and the result has been a splendid tribute to the board type of organization for this particular phase of local administration.

CHAPTER XVI.

THE CHICAGO SANITARY AND DRAINAGE DISTRICT.

The sanitary history of Chicago would reveal some facts of unique interest. Situated in a basin of low levels, the problems of drainage and sewage have been beset with difficulties of an unusual nature. Again the city has been confronted by a condition that has, in recent years, been a constant menace to its health and has created an active interest in the consideration of the problems of sanitation. In times of heavy rainfall, it is not unusual that the drinking water of the city is weighted with mirky, germ-ridden evidence of the fact that the lake is the place of sewage deposit and the source of water supply. Although the charter law of 1872 conferred upon the council ample powers to control and to develop a sewerage system that would meet all the needs of an efficient sanitary administration, its efforts were defeated by the presence of geological conditions that prevented the natural drainage area from coinciding with the area of the city. This patent fact has prevented the treating of the problem of sanitation in that broad view that the future growth of the city would demand. A more comprehensive treatment of the problem was a necessity. The only relief was in seizing upon the natural conditions of drainage, and in the organization of an administrative area that would correspond to prevailing geological conditions. Extra legislation was therefore necessary. A general law followed enabling the cities of the state to organize such areas for the purposes of drainage and public health. The drainage district of Chicago was first organized under the act of June 6, 1887. In a past geological age, the waters of Lake Michigan doubtless poured into the rivers that feed the Mississippi. But nature had reared a barrier of rocky strata that separated the two great water systems. The traces

of their past connecting waterway has provided a basis for the organization of the Chicago drainage district. By piercing this natural barrier the waters of Lake Michigan can once more be turned through the dirty, sluggish Chicago river, and the purity of the city water supply be indefinitely assured. In the midst of stupendous engineering and financial difficulties, the work has been prosecuted towards completion, and the drainage canal promises to assume an importance in the future history of the city upon a broader basis than that of drainage alone. The law of 1887 was not sufficiently comprehensive to meet the necessities of the undertaking, and the legislature was asked to extend the provisions of the original act. This was accomplished through the organization of the drainage basin into an administrative district for sanitary purposes.¹ The limited amount of sewage that the city could discharge into the southern rivers by the act of 1887 would not warrant a serious prosecution of the work of drainage. These series of acts organizing the sanitary area is designed to give the city relief from the unsanitary conditions that have always prevailed, but which have assumed a more aggravated form in recent years through the extension of sewerage system. The immediate object is the solution of the sanitary problems connected with Chicago and the suburbs to the west and to the south, but the mediate and ultimate object of the construction of the drainage canal has a wider basis of interest, if not a more vital one.

Before Chicago had become of any importance as a settlement, the Indian tribes, trappers, and traders had used the Chicago river as an easy portage between Lake Michigan and the streams that flowed into the Mississippi system. This is the beginning of the commercial importance of this geological fact, and has ever stimulated a desire upon the part of the active business interests of the city to seize upon this natural opportunity, and to convert it into a waterway that would amply fulfill the promises of the commercial destiny of Chicago. Unused canal

¹Law of May 29, 1889.

beds at various points present tangible evidence of a commercial hope of uniting the two water systems of the great lakes and the Mississippi. The Michigan and Illinois canal was one of the earliest of these projects, and unquestionably it has vitally assisted the commercial beginnings of Chicago. The construction of the present drainage canal upon outlines of great magnitude has in view the full realization of the earlier canal schemes in the opening of a waterway that would permit the traffic of the two water systems to mingle freely without the necessity of transfer.

The history of the legislation leading up to the organization of the Chicago sanitary district points to the unquestionable influence of the cities lying along the valleys of the Des Plaines and Illinois rivers, in formulating certain provisions of the organic law. Furthermore, the outcome of comprehensive legislation for the canal project depended upon the representatives of the interest of the valley cities in the state legislature. From a sanitary point of view their position was one of unquestioned opposition. The water supply of these cities is drawn from the very rivers that would be utilized to carry the heavily polluted discharge that would flow from Chicago and other cities of the drainage basin. On the other hand, they viewed with favor the commercial possibilities that would result from the construction of the canal on lines that would float traffic between the lakes and the Mississippi river. Before the opposition of the middle cities could be broken down it was necessary to show two facts: in the first place, that the sewerage of the city would be purified before reaching those cities that drew their water supply from the rivers receiving the discharge of the canal; and in the second place, the law must make provision for the conversion of the canal into a water highway if desired.

Upon the basis of a common understanding the co-operation of the valley cities was assured, but their interests have been carefully guarded by the organization of a league composed of those cities lying along the valleys of the various rivers that

would be affected by the opening of the canal. The occasional representative assemblies of this league of some thirty cities, watching jealously all the details of the construction of the canal with reference to their vast economic and sanitary interests, carries with it the suggestion of the city leagues of other times. The possibilities of a league of such interests influencing the legislature of the state stands unquestioned.

By the act of May 29, 1889, the Chicago sanitary district took final form as an administrative area with the full municipal powers within the provisions of this act. The *modus operandi* for the organization of the district is fully outlined. In this law the principles of general and special legislation meet. It is a general act for the whole state designed especially for the sanitary problem of Chicago. The territorial limits of a drainage area cannot pass beyond the bounds of a county which is the unit for the administration of the local finances. In accordance with the general practice, the initiative was left to the people of the several corporate bodies concerned. Upon a presentation of a petition bearing the signatures of a thousand voters, the county judge was authorized to call to his assistance two circuit judges who are to constitute a board of commissioners to consider the petition and all conflicting claims and questions that arise, to determine the boundary lines and to submit the question of organization to a vote of the people of the district. The first step in the formation of the territory is a judicial process.

The district does not assume an administrative character until the work of the judicial board has been accepted by the people, when a board of nine trustees are selected to constitute the sole administrative authority. The board type of organization is thus adopted; and, in harmony with the latter legislation with reference to park organization, the source of tenure is lodged with the people rather than with the governor of the state. A further innovation in the tenure of local boards appears in the application of the cumulative system¹ of voting which is in

vogue in the return of the members of the state legislature. Nine members are elected for a term of five years. Each voter of the district may distribute his votes among not less than five-ninths of the candidates to be elected, leaving four votes to concentrate as he may desire. This secures a minority representation upon the board in case partisan interests enter in the contest, or in the effort to select especially fitted candidates. The election of the president of the board converts it into a corporate body for the purpose of administration with full powers to manage and to control the property of the district, and to carry on the construction of the canal. The board completes its organization by the election of a clerk, treasurer, chief engineer, and attorney. It possesses full ordinance power, and many other municipal rights.

The financial tasks incident to an undertaking involving the expenditure of such vast sums made new legislation necessary. This resulted in the act of 1889 which fixed the maximum bonded indebtedness at \$50,000,000, or five per cent. of the taxable values of the property of the area. The constitution required a direct tax sufficient to meet the interest on the bonded indebtedness and discharge the principal within a period of twenty years. For purposes of construction the tax limit is placed at one and one-half per cent. The administrative work of levying and collecting the taxes is a part of the regular revenue systems of the state, and places the matter of assessment with the towns of the district.

The element of contract is at once placed beyond the sphere of theoretic discussion, by providing that all pieces of work where the contract price passes beyond \$500 shall be given to the lowest bidder. A shifting attempt to protect home labor appears in the requirement that all employees upon the canal shall bear at least papers of declaration of citizenship.

The continuous flow of water of the canal must maintain a volume of at least 300,000 cubic feet, with a current not to exceed three miles per hour. In order to fulfill these require-

ments the channel must possess a depth of 14 to 18 feet, with a width of 160 feet. In case the federal government undertakes to prepare the streams that connect the canal with the Mississippi for purposes of navigation the volume of flow may be increased to 600,000 cubic feet.

The canal is passing through its second stage of organization, which is its period of construction. The first stage has been noted as a judicial adjustment of claims and fixing of boundaries. The third stage begins with the completion of the canal, when the governor of the state shall appoint a board of three persons, who with a competent engineer shall pass upon the fitness of the canal to receive the flow from Lake Michigan. This commission shall represent the whole water-way to the Mississippi.¹

The sewerage system of Chicago, so far as it flows into the Chicago river and its branches, will not be affected when the stream reverses its accustomed course. The solution of the problem of sewage disposal is largely a local one. Those larger municipalities that are situated in the basin of porous soils have almost invariably adopted the land treatment in the form of the sewage farm. By this process, a certain revenue is derived from a heretofore barren source. The soils of the suburban districts of Chicago are those well adapted for sewage farm purposes. But a possibility of greater moment was involved in the construction of the drainage canal. The problem of sewage disposal is not one of revenue, but one of public health. The motives that led to the selection of the canal and rivers to the south instead of other methods were doubtless a product of the commercial forces that center in the city of Chicago, and which sought to strengthen their position by connecting Lake Michigan with the Mississippi river and its tributaries. The motive of drainage has carried the construction over its initial and difficult

¹One member shall represent the territory between Joliet and La Salle, a second between LaSalle and Peoria, and a third between Peoria and the mouth of the Illinois river.

stages, when the commercial features of the work may receive their proper tests. The administrative relation of the drainage district to the municipality of Chicago is one of complete separation, except in territorial jurisdiction. At this point it is only a partial relation. Although the interests of Chicago are those mainly involved, yet an administrative connection with the city could not be properly established. The drainage district is an administrative area for specific municipal purposes, and in this respect stands in the same relation to the city as the park districts.

CHAPTER XVII.

THE RECONSTRUCTION OF MUNICIPAL CHICAGO.

The attitude of the public mind toward the American cities is one of reform and reorganization. This view becomes more critical upon a closer examination into the organic relations of the institutions of the city, and into the policies that dominate the administration. Elements of disturbance and weakness are prominent, and general administrative confusion threatens a uniform and harmonious expansion of the municipal life and institutions.

The historian of municipal institutions is not unprepared for this discovery. Below the chaos that has characterized American municipal development is discerned the struggle of forces, which, in the absence of systematic control, have expressed themselves in disorganized and discordant facts. Silent and unnoticed the dynamics of modern society have wrought their changes in the institutional structure of the city. The American cities have been the great sufferers from the expansive and mobile nature of western life; they have been planted and developed in response to industrialism and in the absence of a deep concern for the problems incident to urban centers.

The industrial location of Chicago has brought to the city a full measure of these threatening conditions. Eliminating from the present consideration the abuses of mal-administration and suggestions of municipal dishonesty, the development of the institutional life of the city has created administrative chaos and confusion in many of their most chronic phases. The problem of the organic reconstruction of the administrative institutions within the municipal area is presented in the following facts: Partially or wholly within the municipal area of Chicago are operating as independent administrative authorities, the county

of Cook, twelve townships, three park boards, the drainage district, and the corporation of Chicago. With the exception of the towns all these authorities have independent powers of taxation and expenditure. In fact, the people of Chicago possess too much government. Harmony and symmetry have been sacrificed in the creation of new administrative authorities and in the maintenance of rural institutions within the corporate jurisdiction of the city.

In considering the problem of reconstructing the administrative institutions of Chicago, two sets of conditions, which are quite distinct, must be discussed. The first pertains to the relation of the city to the state; and the second to the question of charter organization.

The relation of the city to the state involves the problem of central control. In order that a proper sphere of activity may be fixed for the central and local administrations there is need of a redistribution of administrative functions. The instruments of control, developed by the modern state over the locality, as well as over the whole administration, are these: judicial, legislative, and administrative. Our law has placed the municipality upon a private legal basis in order to insure its responsibility before the courts and the people. While the view narrows the position of the municipality in its public relations, it enforces its responsibility through the ordinary judicial procedure. The citizen is thus enabled to question the financial policies of the city in tax assessment and expenditure. The position of the municipality as a private juristic person enables the development of a strong judicial control over the acts of the administrative officers.

It is, however, in the nature of legislative control that the relation of the locality to the state central authority appears. In the American commonwealth legislative control, which early received its confirmation by the United States Supreme Court,¹ presents the locality in complete subordination to the power of

¹U. S. vs. Baltimore & Ohio R. R. Co., 17 Wallace, 322.

the legislature. The municipality is a corporation for administrative purposes and, as such, is subject to specific regulations by the sovereign authority of the state. The charters of incorporation implied special privileges and immunities, and brought their varied forms of organization. In the absence of administrative control the era of special legislation, with its persistent interference with the affairs of the city, was the natural result of the extreme doctrine of legislative sovereignty. This extreme tendency toward legislative centralization has led to excessive administrative decentralization. City charters have become statutory enactments, and as such are subject to the easy processes of ordinary legislation. General municipal legislation has been provided by the constitutions of a number of states as a check upon extreme legislative interference. This severed the only element of control possessed by the state over the locality, and naturally led to systematic evasion of the provisions of the general legislation, by excessive classification of the cities in order to establish more specific control.

The first years of the municipality of Chicago were characterized by the abusive features of special legislation, and the legislature became the place in which the triumph of local policies was contended for through a system of municipal lobbies, that the city was compelled to send to Springfield to guard its interests and secure new legislation. Here lies the cause of much of the administrative confusion that has characterized the municipal development of the city. The constitutional convention of 1870 placed Illinois in the list of those states requiring general legislation for the municipalities. The general law followed in April, 1872, and was accepted by the city of Chicago on April 23, 1876. Since its adoption the council has become more active in ordnancing the affairs of the city, and it has enjoyed a larger freedom from legislative interference. The city of Chicago has, however, occupied an exceptional position before the legislature since the adoption of the general law. Extraordinary conditions have forced legislation of a special nature. Control must be

exercised by the state in some form. The legislature is the only organ of central control developed by the American states. On the other hand, an overt attempt has been made through general legislation to loosen the restraining power of the legislature, without the substitution of a system that would enforce responsibility upon the part of the locality.¹ The element of a more pliable control is undeveloped. The disorganized condition of the local finances, the wide-spread and rapid increase of municipal indebtedness and expenditure are demanding the creation of a central administrative authority as the agent of the legislature, in the supervision and control of the local administration. No healthy sphere of local autonomy for the cities of Illinois can be assumed before this essential instrument of control is instituted. The administrative experience of England, Germany, and France have indisputably established the fact that administrative control is necessary in order to assure harmony and uniformity, as well as economy, in local administration. This will tend to establish the proper relation of the rural and urban units to the central administrative authority of the state, and to change the character of legislative centralization by the creation of a firm, yet elastic, control not permitted by the present system.

In the solution of the problem of local autonomy, the redistribution of administrative functions in order to determine the proper spheres of the local and the central administrative authorities becomes a question of great importance. The decentralized nature of the administrative system of the American commonwealth has thrown the burdens of administration upon the local units. All the needs and activities of the state have been considered local. No general effort has seriously been made to differentiate the administrative activities of the state upon the basis of general and local needs.

However, tendencies are discernible toward the creation of a

¹The decisions of the Supreme Court make it possible for a return to special legislation.

sphere of central administrative control over those problems that are general in their significance. Centralizing tendencies are at work which are slowly constituting a sphere of central administrative activity. This tendency recognizes that the locality possesses its problems of a local setting. The essential factors in this distinction are being recognized, while the local officers have attended to both local and state business. Their position is dual; as agents for the state for general administrative purposes, and as organs of the locality for local needs. The centralizing tendencies are gradually creating central administrative institutions, which have in view the relief of the locality from the administration of those problems which are general in their character. The solution of the question of the redistribution of administrative functions lies in the distinction between local and state needs. The evidences of administrative centralization appear in state boards and institutions of education, of charity and corrections, of health and sanitation, of tax equalization, of prisons and asylums, and the appointment of local officers and boards by the central state executive, where their work is considered of general importance, as in the police and park boards of the cities, or in the appointment of local town and school officers, which prevails in some of the southern states. The growth of central administration is closely linked with the source of revenue and objects of expenditure. The assumption of these general problems by the state will necessitate the classification of the state revenues and expenditures upon the basis of local and general needs. Tax reforms and the redistribution of administrative functions must be parallel movements. The confused status of the revenue laws of Illinois upon the sources of revenue and the methods of assessment and collection is the greatest barrier to the development of a healthy central and local administrative activity. The state has made one advance in the recognition of the distinction between local and general revenues in the provision for the state assessment of railroads and their rolling stock. It also becomes evident that no exact theoretic line

can be drawn that will fully satisfy the conditions for the differentiation of these two sets of problems, but that administrative experience must determine the principles of separation.

The correct solution of the relation of the locality to the state, and likewise the first step in municipal reform, depends upon the development of central administrative control over the local units, and in the creation of a central sphere of administrative activity. These are lines of development that are gradually commanding the attention of the public.

The above considerations pertain to the external relations of the city. The second step in municipal reform is concerned with charter reorganization. In discussing the elements of charter organization, a sphere of local municipal autonomy is to be assumed. The needs of a closer consideration of the technique and machinery of municipal government stands unquestioned. In reference to the particular needs of the city of Chicago, there are two problems of special importance to be considered in its administrative reconstruction. The first problem is of the most pressing nature. It is the need of the consolidation and simplification of the independent administrative authorities operating within the municipal area. The second problem considers the organic relations of the various municipal organs created by the charter.

The vast array of competing, tax gathering, and expending authorities, operating independently within the municipal area has militated against the progress of municipal reform in Chicago. The abolition of this conglomeration of superimposed areas and competing authorities of the county, towns, and parks must eventually be accomplished. The weightiest argument for the persistence of present institutions is historical. These accumulated tendencies have, however, no very trenchant historical setting. In discussing the territorial consolidation of the administration of the city it must be assumed that the constitution of the state offers no barriers to administrative reform. The first vulnerable point in the present system is the presence of the

rural towns in the municipal area. The towns perform two administrative functions of great importance to the city, viz.: the assessment and collection of its direct revenues from personal and real property. The slovenly and inefficient manner of the administration of this important service has been pointed out in another place. The presence of a large patronage associated with the towns affords a political basis for their existence. The municipality has largely absorbed the business of the town and county in all matters except charity and taxation. The position of the towns as a part of the general state system of taxation involves the substitution of some organ that would consolidate the municipality into one area for purposes of assessment and collection of revenues. A central board of assessors would insure more uniform values and destroy the competition in assessments, that so characterizes the present system. It centers responsibility and retains its representative features. One assessment for county and city would eliminate two disturbing forces which appear in the competition for low valuations between the towns within the city and between the urban and rural towns of the county. The abolition of the towns by popular referendum would in no manner correct the evils of assessment, nor would it eliminate the county from the jurisdiction of the city. This elimination must proceed along the lines of financial administrative reform. With the passing of the towns and the county, the elimination of the distinctly rural institutions within the city is accomplished, and a rational basis is found for the building of a municipal system according to the accepted principles of experience and practice. The work of territorial consolidation is not complete. The three park boards and sanitary district remain wholly, or partly, within the municipal area. Any suggestion to merge the park boards into the regular municipal service would arouse hostility upon the part of those persons most interested in good administration. Viewed from the point of administrative consolidation, simplification and symmetry, and in the best interest of the future municipality, the park

boards should find a place under the jurisdiction of the municipal charter. The administrative difficulties attending the consolidation of the park boards with the city administration are apparent. They have been created as municipalities for park purposes. Their separation from the city affords a larger revenue for park administration. An argument in favor of park consolidation lies in the consideration of the support of the park administration. A service so universally enjoyed by the citizens of the whole city should be a common burden. The separation of the parks from the city administration will not carry the weight of administrative sanction. It should become a department of the city government. One area for revenue and expenditure for the people of Chicago should be the basis of reorganization. But so long as the city administration is lax and indifferent in many phases of its work, and so long as the park administration is characterized by such vigor and efficiency, any attempt to disturb the present basis of park organization would meet with a just measure of hostility.

The sanitary district presents a somewhat different problem. Its territorial jurisdiction could not easily coincide with that of the municipality. As a problem of administration, it tends to assume a state, rather than a municipal importance.

The relation of the city to the county presents a problem of some difficulty. The constitution defines the minimum size of the county, which would seriously interfere with the consolidation of the county and the city. The organization of Cook county is treated in a special manner by the constitution of 1870, and by later legislation. The town-county systems embody the idea of tax assessment and collection, and the care of the poor. The problems of charity are urban, and those of the assessment and collection of revenue can find a more rational solution in a more centralized system. The energies of the municipality have tended to absorb the administrative business of the county. The city of Chicago should then be placed on the basis of an administrative county. This should not affect the municipal

character of its organization, nor the administrative relation of the city to the machinery of taxation. The processes of consolidation would thus be completed, and the confused results of competing authorities and tax levies would be abolished.

Although the question of administrative consolidation remains in an unsolved condition, the problems of charter organization will admit of discussion. The organization of the city of Chicago presents uniquely the elements of an effective reconstruction without radical interference with its present organic relations. The theory of the present organization is one of checks and balances. Although the council stands as the central fact in the system, and possess the initiative in legislation, and votes the municipal budget, the executive has been clothed with the important power of veto and appointment. A decided tendency toward executive concentration has characterized the municipal organization since the adoption of the law of 1872. Each department, after 1875, has been reconstructed in accordance with this tendency to cluster the elements of executive control around the person of the mayor. Upon this basis has been developed the outlines of executive responsibility. The civil service law of 1895 will tend to place this responsibility upon a more secure and more rational basis.

In discussing the problems of charter reorganization, the principle of democracy must be accepted as a fundamental working basis. The American local administrative system is representative, with the chain of executive independence and responsibility fairly established. The theory of checks and balances has reared two competing organs for popular favor—the mayor and council, which tends to weaken the fact of responsibility when viewed from the system as a whole. To the electorate, the mayor and council both appeal. What then should be the structure and relation of these organs in order that the element of popular administration might be brought into proper harmony with the professional character which these authorities should assume? Three essential factors should enter into the

structure of a well ordered local system. The work of these three factors may be discharged by one organ, but this too often leads to confusion. Every local system represents in some form the legislative, executive and consultative phases of a well rounded organization. It is in the relation of these fundamental facts to each other that characterizes and distinguishes the structure of the modern local administrative systems. The city of Chicago presents in clear outline two of these elements, viz.: the executive and deliberative. The norms of the consultative or cabinet feature are preserved in the scattered heads of the administrative departments.

Historically, the best traditions of our political development, as well as the important modern states in Europe, have recognized the representative system as the foundation stone upon which must be reared the administrative edifice. Popular suffrage has attained this in all states where administrative science has made significant advances. Different methods have been utilized in the organization of the suffrage, but its representative institution has exerted a constant influence over the administration. The city of Chicago, within the theory of its charter, presents the common council as the most widely representative fact in the municipality.

The defeat of minority representation in the council in 1875 was a result of public indifference, and omission of the proper election notices. The un-representative nature of the council is the greatest hindrance to proper municipal organization, and has tended constantly to weaken its position in confidence of the people. The council, as the express instrument of popular control, would assume a more vigorous hold upon the forces to be represented, if the ward basis of representation could be eliminated. The council would gradually find its traditional position of vigor and efficiency, and would tend to preserve the essentials for a popular administration.

The principle of popular sovereignty has widely extended the basis of the suffrage, and its control over a number of offices

which are administrative rather than legislative in their character. Two motives have operated to further this movement: the enforcement of the direct responsibility of the administrative officer to the people, and an effort to control these officers as factors in a system of political patronage. In connection with the city one fact has been universally recognized and asserted—the right of the people to elect its chief executive officer. This fact is purely the product of American experience, and exists in no other important modern local system. The theory of checks and balances is largely responsible for this isolated position of the mayor. Machine politics have seized upon these conditions, and reduced the office of the mayor to a political, rather than an administrative position. Executive responsibility has come to mean political responsibility, and the office of the mayor has become a political prize. The same forces tend to make his appointment of the head of departments accord to party considerations. Administrative responsibility is considered as of a secondary importance. It is readily admitted that the heads of departments should not depend upon the suffrage for their tenure. Where then should the source of tenure be placed? Executive concentration makes one answer: with the mayor. England, Germany and France, in many respects with a more popular representative administration than obtains in American cities, has given the emphatic answer: with the council.

It stands unquestioned, that so long as the mayor is elected directly by the people upon the principle of executive concentration, he should appoint those persons immediately associated with him and directly responsible to him. But the tendency to build up the position of the mayor from the element of dictatorial powers is open to serious question. The element of absolute power is no assurance of efficient administration, nor does it make for unity and harmony in the whole administrative activity of the municipality. On the other hand, absolute and positive power is not a necessary fact in the creation of a strong and vigorous executive, but experience points quite con-

clusively to the tact and personality of a strong mayor, thoroughly familiar with the problems of the city, as of weightier consideration, than the elements of dictatorial power. Unity and harmony in administration would follow were the mayor made responsible to the council. This change would eliminate the principle of confusion and the arraying of the council against the mayor, a result which the theory of checks and balances has brought to the American city. This change would mean that the heads of departments would emanate from the council and would assume the dignity of a cabinet, possess a place in the sessions of the council with the power of debate; many of the preparatory measures could be formulated by the cabinet and presented to the council for consideration.

This new relationship would secure personal connection of the council and executive, and enforce a definite responsibility upon the council as the organ of final revision. Public sentiment is not prepared for the transfer of the mayor into the hands of the council. However, tendencies are starting strongly toward the cabinet idea and a closer personal relationship between the mayor and his heads of departments. Still further there is a feeling, which finds expression in the latest municipal charters, that the cabinet should find a closer relationship with the city council. Realizing the radical nature of a proposal to transfer the source of tenure of the mayor of Chicago from the people to their representative institution, the city council, a proposition to increase the term of his tenure, and to organize the heads of the city departments into a mayor's cabinet has both foreign and recent American experience to rob it of its radicalism. If the position of the mayor were not on a political, rather than on an administrative basis, the proposition of the change of his source of tenure to the common council would not meet such party disapproval. It seems fundamental that if this important administrative office is to be rescued from its position of political bondage, and placed upon a professional basis, the popular suffrage must be relieved of the burden of his

direct election. The experience of the American cities in the selection of their chief executive sustains this conclusion. Besides, experiences of greater value point to a relief of the people from the discharge of this function.

In order to avoid the suggestions of radicalism, concessions must be made to the political adherents of popular election of a mayor with the full power that the theory of executive concentration brings him; but some relief would come with the increase of the term of his office. Its political importance would be weakened and tend to place it upon the basis of administrative fitness, and to develop a more unified and continuous policy.

The position of the heads of the city departments affords an excellent basis for the working out of the cabinet idea in Chicago, maintaining the mayor with his present responsibility to the people. Before the nature of the mayor's cabinet can be theoretically or practically settled, the question of the type of organization that shall characterize the departments must be determined. The consideration of the board or single head type of organization involves the question of a professional or popular tenure for control of the city departments. The type of organization is to be determined after a decision is reached upon the desirability of the change of the heads of the departments with the change in the person of the mayor. Civil service regulations do not have in view the application of the merit system to the heads of departments; and, furthermore, the theory of executive concentration for purposes of responsibility does not permit an interference with the personal control of the departmental appointments by the mayor. The nature of the municipal business, the interests of continuity in good administration, the separation of politics from the personnel of the departments, the hope of building up a departmental administration on a professional basis,—all these considerations demand a continuous tenure for the heads of the city departments. The change of the heads of the departments with the change of the

mayor implies a new policy which never occurs, and could not occur in the nature of municipal business. The principle of executive concentration has little basis, in fact, in its application to municipal business. A service built upon a familiar understanding of the problems of administration, and upon a tenure during a wise and efficient management of the departmental work is pre-eminently of more importance to the welfare of the municipality than the political changes that follow the election of a new mayor. For reasons of the weightiest character, already enumerated, the departmental tenure should be continuous. This enables a selection of the type of organization that will ensure this principle of continuity upon a professional basis. The board type of organization seems to present elements that would preserve the best interests of a continued administrative policy and admit of the presence of a technically prepared service upon a widely representative basis. The elimination of the political elements from the service and the fear of bi-partisan boards have little weight. The board system in Chicago is not new. It must be admitted that the history of their administration is not entirely free from criticism, but their tenure was during a period of great administrative confusion for which the boards were not alone responsible. But in order to avoid any suggestion of radical change, theoretic considerations and outside experiences must give way before the accepted conditions that prevail in the city of Chicago. The single commissioner system prevails throughout the departments, and a movement toward a change to the board type of organization would meet with decided opposition, although the sentiment in this regard is not centered entirely on the side of the present system. The single commissioner system has its strongest argument in direct, effective personal responsibility to the mayor. The existence of the heads of the departments so closely associated with the mayor permits of the use of the consultative feature in administrative work, a feature which American experience has

so continuously neglected, and which the later charters are but tardily recognizing as an essential fact in good administrative organization.

The present departmental organization of Chicago affords an admirable basis for the introduction of the cabinet feature without any material change in their charter structure. The city is free to institute these changes and provide for a closer relationship between the heads of departments for purposes of consultation. The mayor's cabinet emphasizes the personal relation in administrative work, a fact which American experience has only preserved in the form of executive appointment and veto. The proposals for the creation of a mayor's cabinet in order that the city of Chicago may come into possession of the consultative feature in administrative work, upon a thoroughly organic basis, has then, the experience of not only the German and French systems, but also the best results of the most recent experience in the charter organization of the American city.¹ The failure of the cabinet idea in the American city has been largely due to its close association with rings and financial extravagance. But this was rather a perversion of the cabinet idea. It is not compatible with the cabinet to grant it power of veto on legislation, which has been the reason for the position of disrepute that it has occupied before the public. The cabinet idea is not new to Chicago. It was the primary fact of the substitute act of 1875, but it met disfavor through the liberal powers of contract and legislation granted it. The principle of unity and harmony in action is secured by bringing the heads of departments together in a regularly appointed cabinet around the person of the mayor, for the free discussion of plans and problems of administration. The usefulness of the cabinet is but half realized until it is brought into closer relation with the council, by permitting it a place in

¹ Charters of Greater New York and the city of Cleveland. Mayor's cabinet of the city of Boston is composed of leading representatives of the business organizations of the city, but has no legal basis.

the session of the council for purposes of debate, in order to secure information upon the details of the current administration. By this method the executive and legislative organs would act in closer harmony in the best interests of the city. Mere accidents, which have been considered as organic facts, have lost the American city this useful feature, but administrative necessity is compelling its recognition, and an open and enlightened public policy demands a larger use of this consultative institution in the interests of system and unity. By the present system the departments are compelled to go before the council committee and lobby in the interests of their departmental work. It forces the heads of the departments and the mayor of the city to assume the undignified and secret rôle of lobbyists, instead of the open and statesman-like discussion of plans and measures before the whole council for its sanction or rejection. The cabinet feature must come if the best results in municipal administration are secured. The council would be in no manner disturbed in its position of power and control over the administration and legislation of the city. But, on the other hand, it would be relieved of many details that are theoretically and practically administrative rather than legislative.

The trend of this discussion has led to this conclusion, that the council should represent the popular elements, and basis of administration and, upon it, as the foundation, as the fundamental fact, representing the people should be built the professional factors of the administration. This preserves the democratic traditions of the American city, and secures the presence of a professionally trained administrative service upon the principle of continuous tenure. But it may be seriously questioned whether the administration of the American city could not broaden its basis of information and activity, and popularize its methods usefully by enlisting the active interest of the citizens in its work. In every city a large body of public spirited men are organized into civic unions for the purposes of furthering the policies of good administration. They stand

primarily, at present, toward the city in a position of critics. Let the city of Chicago institute a system by which the lay element may assume some of the responsibilities of the administration, instead of wasting its energies in controversy and discussion. A committee system could be inaugurated that would bring to the service of the city a vast body of non-professional persons who would lend it valuable aid, and raise the standard of civic interest. Such committees would be composed of members of the city council and citizens who are actively interested in the problems of current administration. The German city has found a solution to this question by admitting to the membership of the committees of the council a large body of citizens who serve without compensation. A closer relation is thus established between the public and the council.

There are a large number of citizens in every city to whom the emolument of office forms the least attractive element, but who would willingly do an honorary service that would give a dignity and character to our municipal administration, of which there is such recognized need. The professional officers and laymen would act as healthy restraining and stimulating forces. Such a system would operate to turn the severe and often just criticism of the civic unions into more effective and useful channels.

The steps in reorganization indicated above are suggested not only by the trend of American municipal government and European experience, but are particularly applicable to the prevailing conditions in the city of Chicago. The elimination of that chaos of competing areas, authorities, and tax assessments, the introduction of a system of primaries for the nomination of the members of the city council, the application of the principle of proportional representation for that body, a closer union of the executive and council through the cabinet system, longer tenure of the heads of the departments upon a basis of especial fitness and training, the infusion into the administrative work of a lay class through the non-salaried office—in other words,

simplification and consolidation according to the best results of administrative experience at home and abroad, will give the municipality of Chicago an administrative position among the cities of modern times, that the enterprise of its business men has given it in the industrial world.

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No attempt has been made to compile a complete bibliography on the city of Chicago. But one aim has been followed: the presentation of the sources pertaining to the institutional history and organization of the municipality in their relative importance. Only those laws, treatises, and documents that have directly assisted in the preparation of this monograph will be cited. In order that the sources may assume their proper relation, they have been classified and arranged upon the basis of primary and secondary sources. The primary sources are mainly the state laws and city ordinances, and from these sources the essential materials have been drawn. The secondary sources have assisted but little. They have served as guides to the primary sources, which have been examined in all instances. The cases have been selected with reference to the interpretation of important powers in the organic relations of the municipal organs, especially since the adoption of the charter law of 1872.

The classification may afford a guide to the sources pertaining to the municipal institutions from the point of view of their organization. Nothing more has been attempted.

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APPENDIX.

The state legislature in the extra session of 1898 passed two important acts which are intended to correct two serious defects in the administrative system of Chicago. One act dealt with the problem of party nominations.

There is general interest manifest in many quarters looking toward the protection of the people in the selection of their party candidates. The Illinois primary law, while taking more advanced ground than most legislation in the other states upon this question, bears two important limitations. In the first place its application is limited to the cities of the state, and in the second place the law does not proceed to the real source of the trouble, the party caucuses. The people may be stimulated to take a more active part in the selection of party candidates. Yet the law will never be thoroughly successful until its provisions are extended to the party caucus.

The execution of the law is placed in the control of the election board. The law specifically fixes the number of precincts in the primary districts, the population of these districts, the qualifications of the judges and clerks, and the number of delegates for any primary district. In a recent opinion given by Judge Carter upon some of the doubtful provisions of the law it is pointed out that the election commissioners are relieved from the exercise of discretionary powers, but they are confined to the specific statements of the act. The formation of the primary districts is, therefore, chiefly in the hands of the party committees. The commissioners have limited revisory powers over the action of these committees.

The fundamental purpose of the law is to permit the people freely to participate in the selection of their party candidates. And while there may be certain possibilities open to the "gang"

to pervert the provisions of the law, yet the limitations upon the party managers are such as to give the people a fair opportunity to select their party nominees. The effectiveness depends upon the people. They must enforce it. The recent tests have been attended with good results.

The second important act passed at the extra session of the Illinois state legislature was directed toward revenue reform. The city of Chicago has been struggling for many years with inadequate revenues resulting from systematic tax evasions made possible by outgrown methods of the assessment of property. While the constitution requires general legislation for the whole state, the present law was passed primarily as a relief for the city of Chicago. The defects of the old system have been noted in detail in another place. The law of 1898 is the result of years of discussion and contains the digested points of numerous schemes.

The general provisions of the bill as they affect Chicago are as follows: For all counties with a population of 125,000 inhabitants a board of five tax assessors is provided. Each assessor receives a salary of \$3,600. Especially for the city of Chicago a second board of three commissioners is created for the purposes of a review of the work of the first board. The tenure of the members of the last board is two, four and six years. The board is empowered to raise, lower and equalize the assessments of either individual or district. The members are elected by the people.

The chief changes to be noted are found in the destruction of the system of town assessors, the double columns of cash and assessed valuations, the publication of the assessment rolls in a pamphlet, a copy of which is to be mailed to each taxpayer, the five per cent. limitation on assessed values, and a board of review for the purposes of equalization.

In the destruction of the town assessors the act bears the outlines of consolidation so much needed in the administrative sys-

tem of Chicago. That was the main source of weakness in the former system. The towns of Chicago are doomed to pass away. Their lingering influences should not be permitted to vitiate the results of an administrative system already complicated by the presence of other independent authorities.

The double column plan is a special feature of the law and should be effective in its results. In one column is to be placed the cash valuation at voluntary sale and in the second column is inserted one-fifth of the cash value which is to be designated the "assessed valuation." The valuation of real estate is to be made every four years and revised yearly with references to improvements and unusual loss. This reference back to the voluntary selling values of real estate furnishes a uniform and equitable basis for the comparison and the adjustment of assessed valuations.

Another provision of equal importance as a check upon the faithful and honest return of property by the citizens and assessors is the publication of the assessment rolls in the form of a pamphlet, and a copy mailed to each taxpayer. This publicity will doubtless check any serious attempt to make false returns of property valuations.

The five per cent. limitations upon the assessed valuation as the maximum limit of taxation is equivalent to one per cent. of cash valuation, and will place the city in possession of an ample revenue for the current administration. Since 1871 Chicago has been compelled to shape its administrative work to inadequate revenues. The present law should yield a revenue beyond \$20,000,000.

The organization of the new system has been noted. The last of the town assessors are elected in April, 1898. They are succeeded by the board of five assessors for Cook county and the board of review of three commissioners for the city of Chicago. Measured by the difficulties in the way of reform in the tax system of Chicago, the revenue law of 1898 is a decided step

in the right direction and outlines a system that is sufficiently concentrated and simple that it should yield good results. The revenue act of 1898 must however be considered as a tentative solution of the problem of assessment for Chicago. The ultimate solution must be one assessment for the whole city instead of five as provided by the new legislation.





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**CONGRESSIONAL GRANTS OF LAND IN AID OF
RAILWAYS**

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PREFACE.

The investigation which has resulted in this monograph was begun in the seminary in American History of 1896-97 at the University of Wisconsin, and continued independently since that time. In its present form it was submitted as a thesis for the degree of Doctor of Philosophy at that university in 1899. A portion of the results obtained have already been published in volume XII of the *Transactions* of the Wisconsin Academy of Sciences, Arts and Letters.

The subject of land grants in aid of railways, as well as of many other features of our public land policy, has been practically neglected by historians. I found, therefore, that my work had to be done from the ground up and that an investigation had to be made of many collateral aspects of land legislation. Some aid has been rendered by various railroad histories and articles on the public lands, but in general only the original sources have been used.

I have endeavored to trace the history of railroad land grants from their inception to the present time. In this my object has been to give an account of the various land grant bills, the arguments for and against them and the forces which caused their success or failure; while I have also tried to connect this bare legislative history with the other features of our public land policy. In addition to this economic side of the subject, on the political side the influence of the legislation on the other issues of the time has been considered, and an attempt has been made to point out what seems to me the deeper and more general importance of my subject.

An effort was made to determine what became of the lands after they left the possession of the government—how the states

and corporations to which they were granted disposed of them. But the materials on this question were too scanty to allow of any certainty in the conclusions reached, although I have thought it advisable to embody such tentative results in the form of an appendix. I hope that further treatment of this subject may be given in general railroad histories of the different states and that my work may be of assistance to those investigating this subject.

In the library of the State Historical Society of Wisconsin have been found most of the materials from which this monograph has been prepared, and I wish to express my appreciation of the unfailing courtesy of the officers of that society and of the members of the library staff. Some additional materials were found in the Chicago Public Library, The Newbury Library and the library of the Chicago Historical Society.

During my work on this monograph I have been under constant obligation to Professor F. J. Turner, who has given not only advice but actual assistance at every point in my investigation and in the preparation of my work for the press. Professor C. H. Haskins has read the proofs and made many valuable suggestions, while Professor W. H. Hobbs has also given assistance in the proof-reading.

Madison, Wisconsin, August, 1899.

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CONGRESSIONAL GRANTS OF LAND IN AID OF RAILWAYS.

INTRODUCTION.¹

Questions relating to land tenure, and particularly to the management and disposal of lands held by the state, have always occupied a large place in the history of nations. In the case of the United States the public domain has been a most important factor in the national development. Aside from the diplomatic and military struggles involved in the acquisition of the soil, and the relation of the slavery struggle to the public domain, the position of the government as landed proprietor has been profoundly important. Even in colonial days the management of the vacant lands by the crown, the proprietors or the corporations who governed the colonies, had important effects in political, economic, and social development. There, as later, land grants were used for political purposes as well as to promote immigration and industrial development. Colonial history affords precedents for the use of land as bounties for soldiers, for education, and for internal improvements. The question of the devolution of the crown lands after the declaration of independence, became one of the most influential factors in the history of the Revolution and the Confederation, and was only settled by the cessions of the claimant states and by the passage of the Ordinance of 1787. The vast political influence of the land question upon the politics of the Confederation has frequently been pointed out, but it cannot be too strongly urged.² The acquisition of the public domain

¹See Sato, *History of the Land Question in the United States*, Johns Hopkins University Studies, IV, nos. 7, 8, 9.

²"And just here lies the immense significance of this acquisition of the Public Lands. It led to the exercise of National Sovereignty in the sense of eminent domain, a power totally foreign to the Articles of Confederation." Adams, *Maryland's Influence upon Land Cessions to the United States*, Johns Hopkins University Studies, III, no. 1, p. 44.

was the first great step toward national unity—the disposal of this domain was to be one of the most important factors in the new national life.

When the Constitutional Convention met it found the public land question settled for the time. Little attention was paid to the power which Congress should have over the lands which the government then owned or which it might afterward acquire. The subject was touched in two provisions of the Constitution, the first that "New States may be admitted by the Congress into this Union," and the second that "The Congress shall have the power to dispose of, and make all needful rules and regulations respecting the territory or other property belonging to the United States."³ The latter of these was not discussed in the convention and the discussion on the former was not such as to throw any light on what property rights the government had in the territory from which these new states were to be formed or on the question whether the acquisition of new territories was contemplated. Madison's discussion in Number 43 of the *Federalist* is not more satisfactory, the only point touched being the prohibition against the division of states without their consent.

It is unfortunate that as regards both the acquisition and the disposal of territory the Constitution is not more specific, and that a contemporaneous explanation of the powers of Congress does not seem to have been made. But, wherever in the Constitution the right to acquire territory is found, the public domain has grown rapidly. Originally amounting to 258,504,129 acres, by the various purchases and cessions it has been increased to over 1,800,000,000 acres.⁴ Of course the actual amount of land

³ Art. IV, Sec. 3.	Acres.
*State cessions	258,504,129
Louisiana purchase, 1803	750,886,855
Florida purchase, 1819	35,264,500
Mexican cession, 1848	329,623,255
Texas purchase, 1850	62,266,953
Gadsden purchase, 1853	29,142,400
Alaska purchase, 1867	369,529,600

Total1,835,017,692

Message and Documents, Abridgment, 1897-98, 589. The figures are only estimates, as much of the territory has not been surveyed.

in the possession of the government at no time amounted to this. Exclusive of Alaska there have been 741,702,365 acres of land appropriated and 132,441,774 acres reserved, leaving 591,343,953 acres vacant at the present time.⁵

The influence, from the earliest times, of the comparatively small public domain was fundamentally important; the influence of these new and vaster areas which came into the possession of the government, and particularly their influence upon the development of the West, was quite as marked.

Some consideration of the methods by which this land passed out of the hands of the government must first be given. Of these various methods, that of cash sales has disposed of over two hundred million acres. The different grants to states, except those in aid of railroads, have taken more than one hundred and sixty million while grants to railroads and homestead entries are next on the list with a little over one hundred million each. This proportion is, however, only a temporary one, as homestead entries are constantly being made and many of the railroad grants are incomplete, while sales and state grants are steadily decreasing.⁶

During the first part of the present century the object of the administration of the public lands was to obtain as large a revenue from them as possible. In 1796 an act was passed providing for public sale of the lands in the Northwest Territory at prices not less than two dollars an acre. Credit on the purchase price could be given. This system continued with some modification up to 1820, when the credit feature was abolished and the price

⁵ Ibid., 591.

*Cash sales	214,414,395
Homesteads	102,280,228
Timber-culture acts	16,118,228
Military bounty-land warrants	60,252,790
Script locations	3,008,516
Indian allotments	560,780
Donations	3,006,128
Railroad, wagon-road, canal and river improvement grants to states and corporations	106,584,898
State grants, general and special	165,476,402
Private land grants	70,000,000

* Total 741,702,365

Ibid., 592.

reduced from \$2.00 to \$1.25 an acre.⁷ The size of the tracts which were sold varied from time to time. Before 1800 only quarter townships and sections could be entered. In that year the minimum was reduced to a half-section, in 1804 to a quarter-section, and in 1820 to a half quarter-section. A further reduction to a quarter quarter-section has also been made.⁸

In 1841 the pre-emption act effected a considerable change in the method of sale by giving a preference to actual settlers, and allowing them to enter the land at a minimum or double minimum price.⁹ This policy of pre-emption dated in effect from 1830 when an act allowing pre-emption for one year was passed. This was followed by extensions from year to year until the permanent law was enacted.¹⁰ While these temporary acts were intended to apply only to those who settled on the lands before the act was passed, yet the practical effect was to encourage squatters who went to the lands in the expectation that similar laws would be passed for their relief.¹¹

Except during limited periods the amount received from the public lands has not been great in comparison with that received from other sources of revenue. From 1816 to 1836 the receipts from customs were \$454,317,403 and from the public lands \$79,408,379, and in 1836 the land sales reached their highest point, amounting to \$24,877,179 as against \$23,409,940 from customs.¹² As a business investment the public domain has not paid the government.¹³ Yet the influence of the lands on national finances was much greater than would be indicated by the amount received from their sale. It was always expected that a large increase in this amount would sooner or later appear and plans were discussed for hastening the time when their sale would cause a great reduction in national taxation.

⁷ Donaldson, *Public Domain*, Washington, 1884, 200, 202.

⁸ Sato, *Land Question in the United States*, 143.

⁹ *Ibid.*, 159.

¹⁰ *Ibid.*, 160-162.

¹¹ *Ibid.*, 162.

¹² *Reports of the Secretary of the Treasury*, IV, 459.

¹³ In 1883 the balance against the government on account of the public lands stood at \$126,428,484. Hart, *The Disposition of our Public Lands*, *Quarterly Journal of Economics*, Jan. 1887, p. 174.

In addition to the lands which were held for sale, grants from the public domain were made from an early period. In 1776 the Congress provided for grants of land to soldiers in the Continental army. This principle was continued in regard to both the War of 1812 and the war with Mexico. The method by which these grants were made was that of land warrants, to be located on the vacant public lands.¹⁴ Besides these general grants to private persons various other grants of a private nature and of a very miscellaneous character have been made.¹⁵

The regular method of such grants was, however, to the different states. All of the public land states, except California, received two, three, or five per cent. on the net proceeds of the sales of their public lands.¹⁶ The states have quite generally received the swamp and overflowed lands within their limits on account of the expense which was necessary to reclaim these lands. The enhanced value of the adjoining public lands was also one of the reasons for these grants.¹⁷ For education, the states, prior to 1848, received the sixteenth sections and after that date the sixteenth and thirty-second sections of their public lands.¹⁸

The grants which were the predecessors of the land grants in aid of railroads were those made to the states in aid of various internal improvements. The right of the government to make money grants in aid of internal improvements was the subject of much controversy, but portions of the public domain were often donated in aid of river improvements, wagon roads, and canals. The last kind of grants was made in the form which was characteristic of the later grants in aid of railroads. By this method of grant the alternate sections were reserved to the government and by their rise in value a reimbursement for the grant was expected. One of the grants, that for the Illinois and Michigan canal, was in 1833 transferred to a railroad, thus making the first railroad grant, which however was never utilized by the

¹⁴Donaldson, *Public Domain*, 232-37.

¹⁵Ibid., 209-13.

¹⁶Ibid., 238.

¹⁷Ibid., 219-21.

¹⁸Ibid., 223.

state.¹⁹ After 1841 each new state was allowed to select 500,000 acres of public land for internal improvements.²⁰

Nearly all of the states chafed under their inability to control the large tracts of public lands lying within their borders and appealed to Congress to cede to them these lands. This request was in 1832 referred to the Committee on Manufactures, of which Henry Clay was chairman. He reported against such a proposition as unjust to the old states, and against the reduction in price, but proposed a distribution of the proceeds of the land sales among the states in proportion to their federal population. The matter was then referred to the Committee on Public Lands which reported against Clay's plan as the equivalent of a distribution of money raised from general taxation, and favored a reduction in the price of the lands to \$1.00 an acre.²¹ In spite of this report Clay introduced a bill on the lines laid down in his report. This passed Congress in 1837 but was vetoed by Jackson. In 1836, Calhoun made almost the same proposition, although clothed in different language. This was to deposit with the states a pro rata share of the surplus revenue then in the treasury. This proposition received the approval of Jackson and became a law.²²

The money thus distributed was used by the states, at their pleasure. In a number of the western states it was employed, directly or indirectly, for internal improvements, but, like most of the state investments of this time, it was very generally wasted. However it had a very considerable effect on the internal improvement craze of that time, and if the money had been received later it would probably have been largely employed in railroad building, as was the case in South Carolina.²³

While not mentioned in the previous platform, Clay's plan for the distribution of the proceeds of land sales was adopted as a part of the party platform by the Whigs after the

¹⁹ Ibid., 257-61.

²⁰ Ibid., 255. *Revised Statutes*, section 2378.

²¹ Schurz, *Henry Clay*, I, 369-71.

²² Von Holst, *Constitutional History of the United States*, II, 186-88.

²³ Bourne, *History of the Surplus Revenue of 1837*, New York, 1883, 122-24.

death of Harrison, and was enacted into law in 1841. Only one distribution was made under its provisions;²⁴ but the issue was carried over into subsequent campaigns by the platforms of both parties, the Whigs declaring for the idea and the Democrats against it.²⁵

This outline of the public land policy of the United States indicates how important a place it had as an independent question in politics. But its importance in relation to the other questions then before the people was even more marked. With regard to financial questions and the tariff the connection was particularly close. The land sales formed an important source of revenue and their increase would have allowed a nearer approximation to free trade, while their diminution or diversion in the manner proposed by Clay would have made necessary an increase in the tariff. Thus views on the tariff were apt to color views on the public land question.

Besides being a source of revenue, the public lands furnished a fund by which internal improvements could be carried on. The right to make such improvements by money grants had by the beginning of Jackson's administration come to be quite generally admitted. But in 1830 the veto of the Maysville road bill checked the system of money grants. The public lands had before this time been used for internal improvements and after the denial of the right of Congress to appropriate money for the purpose they were given to the states and to corporations in large quantities for this purpose, their most extensive use being for railroads. It seems quite possible that if this substitute for appropriations had not been at hand, the pressure on Congress would have been strong enough to secure money instead of the land grants which were actually made.

The question of the power of Congress over the public domain was also affected by the doctrines of state sovereignty held by the opposing schools. The members of the states' rights party were

²⁴Schurz, *Henry Clay*, II, 204, 210-212.

²⁵Stanwood, *History of Presidential Elections*, 4th ed., 149, 155, 169.

inclined to restrict the power to narrow limits and to make much of the reservations in the deeds of cession from the states in regard to the purposes to which the land was to be applied. On the other hand those favoring the exercise of wide powers on the part of the United States could not but welcome the most extreme construction of the powers of the government over the public lands. The bearing of this will be seen in the debates on the railroad grants, where the Democrats were forced to find the power to grant in the position of the government as land-owner rather than as sovereign. And it must be remembered that the most famous debate on state sovereignty grew out of Foot's resolution regarding the policy of the government in the sale of its lands.

What was the connection between the Public Lands and that most vital of ante-bellum controversies, slavery? It is conceded that this was almost entirely a territorial question, and that if there had been no domain into which its extension was to be allowed or prohibited, the history of the United States would have been very different. But aside from the territorial aspects of the case the influence of the administration of the public lands upon slavery was very marked. Had the government, instead of adopting a policy which favored the northern settler who desired and could cultivate only a small tract of land, favored the creation of large estates, the preponderance of the free states in the western territory would not have been so quickly secured. It may be doubted whether any system of settlement would have spread slavery north of the old Missouri Compromise line, but the spread of free settlers could have been very easily checked by a different system of the land administration. Those Southerners who endeavored to hasten the settlement and sale of the public lands were unwittingly assisting in the downfall of their cherished institution.

The industrial development of the country between 1800 and 1850 helps us to understand the form taken by our land policy at the beginning of the second half of the century. In 1800, two hundred years after the first settlement, the

population of the United States was confined to the immediate vicinity of the Atlantic coast. In 1850 the line of settlement had crossed the Mississippi and its extension to the shores of the Pacific was not a remote possibility. Early in the century enough settlers had crossed the mountains to secure for Ohio in 1802 admission as a state. The increase of western population by 1810 was quite strongly marked, but the full force of the movement began to make itself felt during the next decade. The stream of immigration was such as to cause fears among the Eastern states that they would become depopulated. By 1830 Indiana, Illinois and Missouri had each passed the 100,000 mark. Practically all of the western population was, however, confined to the vicinity of the large rivers. By 1840 a large increase had taken place in the states which were settled earliest, while considerable numbers of settlers had entered the newer states.²⁶ The spaces between the rivers were filling up and considerable settlements had appeared west of the Mississippi. In 1850 only six states exceeded Indiana in the number of their inhabitants, while Illinois was eleventh among the states. The greatest proportional increase was in Wisconsin, but all of the states of the Mississippi valley were growing with great rapidity. While all portions of these states were receiving settlers, the lines of densest populations were still among the watercourses.²⁷

To enable these settlers to reach the West, and to furnish trade communications with them, improved methods of transportation were demanded. At first this demand was met by turnpike roads and the improvement of the waterways. Around these centered the plans for internal improvements proposed up to 1830. In 1806 work was begun on the Cumberland road and in 1808 Gallatin proposed a great system of internal improve-

²⁶Illinois had increased from 157,445 to 476,183, Michigan from 31,639 to 212,267, Indiana from 343,031 to 685,866, standing tenth among all the states; Missouri from 140,455 to 383,702, Arkansas from 30,388 to 97,574, while Wisconsin and Iowa appear with 30,945 and 43,112, respectively. *10th Census, Population*, 4.

²⁷See McMaster, *History of the United States*, IV, ch. 33; and *10th Census, Population*, xl, ff.

ments, including not only canals and roads along the coast but roads toward the west. In 1817 the passage of the Bonus bill was intended to aid transportation to the interior, but its object was prevented by Madison's veto. Various other plans were proposed for the extension of roads in the western states, the construction of canals and the improvement of the rivers, but no very important results were obtained from them. In 1830 further aid was prevented by the stand taken by Jackson, although the public lands were still used in aid of canals.

When aid for improvements could not be secured from the government, the states themselves took up the work. In 1817 New York had begun the construction of the Erie Canal, which was finished eight years later. The other states undertook similar enterprises but in most cases their efforts did not attain the same success as that of New York. The failures of the western states were particularly noticeable. Not only were the results obtained insignificant, but the states were driven to a repudiation of the debts incurred on behalf of the improvements. This further led to a distrust in the ability of the states to engage in industrial enterprises and many state constitutions practically prohibited further attempts of this nature by narrow restrictions on public debts.²⁸

About 1830 the railroad began to supersede the turnpike as a means of transportation where rivers could not be used and where canals were impractical. From a construction of forty miles in 1830, railroad building increased rapidly until 1,261 miles were constructed in the year 1850, making a total for the country of 8,571 miles.²⁹ Of course a great part of this mileage was in the old states. By 1850 New England had developed its railway system in its main outlines; in the Middle and South Atlantic states the method in which the railroad systems were to grow was evident, while the states of the Mississippi valley were making their first experiments in railroad building.³⁰ Nor

²⁸ H. C. Adams, *Public Debts*, Part III, Ch. II.

²⁹ *10th Census*, IV, 289-90.

³⁰ Hadley, *Railroad Transportation*, New York, 1886, 36-37.

until about this date was it considered that railroads would supplant canals, at least as far as the carriage of freight was concerned.³¹

The development of the railroad systems in the states along the Mississippi, of course depended on the general industrial development of that section of the country and on the movement of population. So we find that at first the railroads, as well as the population, tended to follow the rivers. Water was to be the chief means of transportation; but at certain places and for certain portions of the year the railroads would render assistance to the rivers. This soon changed, however, when land transportation came to be regarded as independent of that by water, and we find the railroads entering into the thinly populated sections between the large rivers. Finding here large tracts of unoccupied public land, which would rise in value if the settler could be brought to them, it was to be expected that the government would be asked to donate a part of this land in aid of the railroads. Particularly was this the case since the new states were eager that the federal government should exchange vacant land for settlers and that the same beneficent authority should assist in improving the transportation facilities on which the prices of their crops depended.

The change in the routes of commerce is well illustrated in the loss of the freight business which was sustained by the Mississippi just prior to 1850. Products which had before passed down this river and to New Orleans for shipment were now sent by the Great Lakes, and later by the trunk lines to New York. This change had a political as well as an economic influence as it tended to separate the West from the South and unite it to the East, a situation of the utmost importance in the conflict between the sections.³²

The outcome of all these industrial conditions, toward the close of the first half of this century, along the rivers, the

³¹ Ibid, 11-12.

³² See Libby, *Significance of the Lead and Shot Trade in Early Wisconsin History*, *Wisconsin Historical Collections*, XIII, 293-334.

change from water to land transportation, and the prohibition of state activity, led the railroads to seek aid in the only way left open to them, grants from the public domain. In doing this, they simply demanded for a new agency of transportation, the government aid which had been afforded to its imperfect predecessors, the canal and the turnpike.

CHAPTER I.

THE BEGINNING OF LAND GRANTS.

The grant in which the later grants to railroads may be said to have originated was that in aid of a canal in Indiana.¹ In an amendment to this the alternate section principle was inaugurated,² while similar grants were made at the same time to Ohio and Illinois. In 1833 the grant for the Illinois and Michigan canal was transferred to a railroad,³ but this was never utilized except in connection with the later grant in aid of the Illinois Central.

The right of way through the public lands was frequently granted to railroads from this time on, but such grants at first carried no extra donation of lands. Sometimes the right of pre-emption was given the railroad company. These were, however, in no sense land grants and so have not been considered here.

In 1835 a memorial from Michigan was presented to Congress asking for a grant of lands in aid of a railroad from Detroit to the mouth of the St. Joseph river. No definite amount or manner of grant was specified,⁴ and no action was taken upon the petition. During the next year a favorable report was made on a bill granting alternate sections of land for a railroad from Mobile to the Tennessee river. The increased sale of the public lands which would result from the construction of the road was given as a reason for the passage of the bill.⁵ Later in the year a bill granting lands for a road from Jefferson City, Missouri, to the Mississippi, via Little Rock, Arkansas, was also favorably reported,⁶ but no action on either bill was taken.

¹*Statutes at Large*, IV, 47.

² *Ibid.*, 236.

³ *Ibid.*, 662.

⁴*Exec. Docs.*, 2d sess. 23d Cong., No. 131.

⁵*Reports of Committees*, 1st sess. 24th Cong., No. 607.

⁶ *Ibid.*, No. 651.

In 1838 the strongest attempt thus far was made to secure a land grant. This was for a road from New Albany, Indiana, to Mt. Carmel in the same state. A favorable report was made from the Senate committee on Roads and Canals,⁷ and the bill was taken up in the Senate on June 6. Smith of Indiana made the principal speech in its favor. He said that the lands along the proposed road had been in the market for nearly thirty years without finding a purchaser and that the road would render them salable. He also considered the carrying of the mails free, as was provided in the bill, a full equivalent of the value of the lands. Niles, of Connecticut, who throughout his career in Congress was the consistent antagonist of land grants, opposed the bill as unconstitutional and as being a bargain with a corporation. A motion to strike out all after the enacting clause prevailed by a vote of 23 to 11.⁸

As some of the opposition to the bill arose from the fact that the grant was made directly to a corporation attempts were made later in the session to amend it so that the grant would be made to the state.⁹ Nothing was done, however, nor was any other important action taken at this session.¹⁰ The next year the New Albany and Mt. Carmel bill was introduced again but was amended in the Senate so as to give the right of pre-emption only,¹¹ and although in 1840 it was introduced as a land grant bill in the House, it was buried in the committee of the whole.¹² The failure to secure the passage of this bill showed that the time was not ripe for railroad land grants. It had much greater merit than many roads which later secured grants. New Albany was on the Ohio, opposite Louisville, while Mt. Carmel was on the Wabash. The road would, it was claimed, secure a passage around the low water of the lower Ohio, and thus afford an out-

⁷ *Sen. Docs.*, 2d sess. 25th Cong., No. 203.

⁸ The support of the bill came from the South and West, the East being almost solidly against it. *Globe*, 2d sess. 25th Cong., 434.

⁹ *Ibid.*, 450.

¹⁰ For other reports on land-grant bills, on which no action was taken, see *Sen. Docs.*, 2d sess. 25th Cong., Nos. 454, 455.

¹¹ *Senate Journal*, 3d sess. 25th Cong., 270.

¹² *House Journal*, 1st sess. 26th Cong., 1128.

let for the products of Ohio, Kentucky, and Indiana to the Mississippi and thence to New Orleans.¹³

From this time the consideration of land grants disappeared from Congress until 1846, when the request came from a southern state. A bill was introduced making a grant of the alternate odd-numbered sections for five miles on each side of the line for a road from Jackson, Mississippi, through Brandon to the western boundary of Alabama. It was debated in the Senate April 30th. The opposition was voiced by Bagby, of Alabama, on the ground that the grant was the same as a money appropriation for internal improvements and because the price of the lands remaining in the hands of the government along the line would probably be raised. Speight, of Mississippi, said that the purpose of the bill was to enhance the value of the remaining public lands, while Calhoun took very similar grounds when he said that he favored the bill because it would benefit the treasury.¹⁴ Yulee, of Florida, favored the bill because Mississippi had not had her share in the distribution of the public lands.¹⁵ Haywood remarked that if the principle of proportionate distribution was carried out the old states should have their share. To this Yulee answered that it was on account of the exemption from taxation which the public lands had enjoyed that a share in the lands was due the new states.¹⁶ The Mississippi bill was ordered read a third time by a vote of 28 to 8,¹⁷ and passed the next day. It was not brought up in the House. The arguments advanced for and against the bill were, in their main features, followed in subsequent discussions of the subject. In them four

¹³ See *Sen. Docs.*, 2d sess. 25th Cong., No. 203; and *Sen. Docs.*, 3d sess. 25th Cong., No. 49. A memorial from New Orleans merchants accompanied the latter report. For the Illinois internal improvement scheme of 1837, with which this road was to connect, see Moses, *Illinois, Historical and Statistical*, I, 411. As late as 1849 the Illinois legislature passed resolutions favoring a grant to the New Albany and Mt. Carmel road. *Sen. Misc.*, 2d sess. 30th Cong., No. 36. The road was not built until much later.

¹⁴ *Globe*, 1st sess. 29th Cong., 751.

¹⁵ The truth of this position is not clear. Mississippi received the usual five per cent. of the proceeds of the sale of her public lands (*Statutes at Large*, II, 348), and one of the first grants of public lands for education (*Ibid.*, II, 229).

¹⁶ *Globe*, 1st sess. 29th Cong., 752.

¹⁷ *Ibid.* The negative votes were from New Hampshire (2), Connecticut, North Carolina, Georgia (2), Alabama, and Tennessee.

ideas are prominent. The opponents of the bill called it an internal improvement scheme, and objected to increasing the price of the lands; those favoring it claimed that it was a positive benefit to the treasury; and others held that the states had rights to a share of the public lands. It will be interesting to note the development of these lines of argument.

The first session of the thirtieth Congress, held in 1847-48, barely escaped being a fruitful one in land grant legislation. A bill was introduced making a grant for a railroad from Hannibal, Missouri, to St. Joseph.¹⁸ This was followed by one making a grant to Iowa for a railroad across the state,¹⁹ and these bills were incorporated with a bill making a grant for a railroad from Mobile to the mouth of the Ohio, and with one making a grant for a road from Jackson to the Alabama state line.²⁰ This very extensive bill passed the Senate without difficulty²¹ and almost slipped through the House. When it reached the House it was ordered read a third time without division and almost without discussion.²² This was only two days after it had passed the Senate. That there was method in this haste seems very probable from the fact that the next day the vote was reconsidered and the bill laid on the table, 102 to 80. Of the New England states, New Hampshire, Massachusetts, and Connecticut favored the bill, as did New Jersey and Delaware in the Middle States. Aside from these none but the western land states voted in its favor.²³ In the West, Ohio and Indiana were against the bill.

¹⁸ *Globe*, 1st sess. 30th Cong., 728.

¹⁹ *Ibid.*, 763.

²⁰ *Ibid.*, 1051.

²¹ The vote was 34 to 15, the negative votes being from Maine, Vermont, Connecticut (2), New York (2), Maryland, Virginia (2), South Carolina, Georgia, Florida, Tennessee, Kentucky, Indiana, *Ibid.*

²² *Ibid.*, 1059.

	For.	Against.
²³ New England	9	10
Middle	31	23
South	28	9
Gulf	5	5
West (land)	17	26
West (non-land)	12	7

House Journal, 1st sess. 30th Cong., 1241. In this classification of the states, "Gulf" includes Florida and Alabama, but not Texas; the western non-land states are Texas, Tennessee and Kentucky. Thus the first three and last categories are those states without public lands, and the fourth and fifth those with lands.

The only other land grant bill of importance at this session was the Illinois Central grant, which will be considered in connection with the passage of that act.

The tendency of population to follow the watercourses during the period prior to 1850 and the prevalence of the idea that railways were only supplemental to rivers and canals has already been noted. This is well illustrated in the land grant legislation which we have just been considering. The bills which received the consideration of Congress were largely for roads which followed natural watercourses and which were to assist these water routes during seasons of low water. Yet just before 1850 a decided change may be observed. In the first session of the thirty-first Congress only four bills for roads of this character were introduced while there were fifteen bills for roads connecting separate waterways. It would appear that if the requests of those asking land grants were agreed to, these grants would materially assist in the development of the country lying between the rivers.

The prospects for railroad land grants cannot be said to have been bright at the close of the thirtieth Congress. The Senate was willing to give nearly all that was asked but the House was firm in its position against the grants. The cause of this difference in sentiment seems to have been the greater proportionate representation of the new states in the former body. A similar difference in the two houses of Congress has often been observed in connection with other questions which divided the country on sectional lines. It is to the House then, that we must look in our future consideration of the land grant question. And it is this body which is the most difficult to study. The propensity of the Senate to debate with thoroughness all questions which come before it even to the delay of important public business has of late years been the subject of much unfavorable comment. But whatever the defects of the plan from the point of view of the public interest, it enables the student of the constitutional history of the period to learn much of the opinions and motives of members of the Senate. In the House, on the other

hand, debate, even in the period now under consideration, was much restricted. The great number of members also makes a determination of the causes of individual action much more difficult than in the case of the Senate. The problem which is before us, the cause of the changed attitude of the House, and whether that change was one of permanent sentiment or due to temporary political causes, must be considered in the succeeding chapters.

CHAPTER II.

THE ILLINOIS CENTRAL GRANT.

The first bill to force its way through the opposition of the House was that granting lands to Illinois, Mississippi, and Alabama, in aid of the Illinois Central and Mobile and Ohio railroads. Aside from the amount of land granted, this bill was of special importance from its position as pioneer. The precedent once established, the path of the other bills was rendered easier, for the benefits which had been secured to the three states were with much justice demanded by the other land states. Illinois had received land, and why should not also Iowa? A separate consideration of the Illinois Central bill with a view to determining the forces which secured its passage is therefore necessary at this point in the history of railroad land grants.

As early as 1844, Senator Breese had endeavored to secure for the Great Western Railway company of Illinois the right of pre-emption of the public lands along its line. He considered that right of as much practical value as a grant to the state in aid of the road would have been, especially as there seemed no hope of securing such a grant. In this he was opposed by Stephen A. Douglas, then a representative from Illinois in the House, who believed that the chances of securing a grant to the state were good and that to ask for the pre-emption right would embarrass efforts to secure a grant at some other time.¹ But in 1846, Breese, then chairman of the Senate Committee on Public Lands, introduced a bill granting alternate sections of the public lands in aid of the Northern Cross and Central railroads.²

¹Douglas to Breese, Jan. 5, 1851, *Springfield Daily Register*, Jan. 20, 1851. Reprinted in *Fergus Hist. Ser.*, No. 23, pp. 66-7.

²*Globe*, 1st sess. 29th Cong., 208. The Northern Cross road was from Quincy to the Indiana line.

He did not have much faith in this bill for it was never called up, and at the second session of this Congress he again introduced his pre-emption bill, which did not pass.

In the fall of 1847, Douglas, then thirty-three years of age, entered the Senate. With his appearance the situation was materially changed. His marked political ability had already won for him a high place in the Democratic party. As a practical politician, skilled in the manipulation of men for the benefit of his own or his party's measures, he has probably not been excelled by any other American. As a debater he was adroit rather than deep, and his well-known speeches on Kansas and in his debates with Lincoln show his great skill in the favorable expression of his side of the question. Yet it would be unjust to consider him as working merely for the sake of the party spoils. He had large views as to the future of his country and particularly his section of it. His faith was in the speedy development of the West, and in that he was anxious to assist. Even beyond this he believed in "manifest destiny;" at present he would have been called an "imperialist." A bill which enlisted his personal approval and which did not run counter to the position of his party was sure of his hearty support and by that support was placed very near success.³

Not only was he in hearty accord with the principles of the grant for the Illinois Central, but he seems to have been the chief supporter of that measure. Breese favored the securing of the right of pre-emption and considered the attempts to secure a grant only wasted energy. In accordance with this belief, he introduced a pre-emption bill, a move which received the severe criticism of Douglas, who felt the weakness of their divided position and thought that Congress could hardly be expected to donate lands to Illinois when one of her senators only asked the right of pre-emption of those same lands. Breese, however, said that he only wished to have the pre-emption bill on the calendar to call up after the anticipated failure of the land grant.⁴

³ For a good characterization of Douglas, see Rhodes, *History of United States*, I, 244-6.

⁴ Douglas to Breese, Jan. 5, 1851, l. c. pp. 69-73.

It would seem probable that the moral effect of the division of the Illinois senators on the fate of the bill was considerable.

Both introduced bills in accordance with their ideas, but Douglas made an important modification in the one which he put forward. The Central road of the previous bills had been from Galena to Cairo, following the great natural waterway of the Mississippi and the route which western commerce had up to this time taken. Douglas modified this by a "branch" from Centralia to Chicago. By so doing he believed that he would strengthen the bill by connecting with it the Eastern interests of the Great Lakes and the roads then building toward Chicago.⁵ Politically the idea was an excellent one, but Douglas may also have foreseen the current of commercial development, in the path of which he desired to place himself.

This bill came up as a special order May 3, 1848. A disagreement as to the carrying of the mails by the road was settled by providing that the United States District Judge was to fix the rate.⁶ Niles then opened the opposition to the bill by declaring that Congress had no power to carry on internal improvements and that a grant of lands was only an evasion of the Constitution.⁷ Crittenden, of Kentucky, and Bagby, of Alabama, discussed the constitutionality of the bill at some length. The former considered the right of Congress to grant lands settled by precedent, while the latter did not think that constitutional questions could be settled that way.⁸ The discussion took another turn when Butler, of Carolina, claimed that the West would receive all the benefit from such a law. Crittenden replied that it was no more than was due the West as the East had received all the benefit from appropriations for forts and custom houses.⁹ Cass supported the bill on the theory that the government, as a land-owner, could dispose of its lands as it saw fit

⁵ *Ibid.*, 69.

⁶ *Globe*, 1st sess. 30th Cong., App., 534-5.

⁷ "To say that we can get round the Constitution by granting the public lands, instead of taking the money directly out of the treasury, is certainly trifling with the judgment of this body." *Ibid.*, App., 535.

⁸ *Ibid.*

⁹ *Ibid.*, App., 536.

and do what it could to enhance the value of those lands.¹⁰ Calhoun followed with almost the same argument of financial benefit which he had once before used.¹¹

These arguments have been heard before but are here developed into their final form. To one who interprets the Constitution as loosely as most of us do at the present time neither of the arguments seems sound. Congress can "dispose of" the public lands. That seems ample authority for a grant in aid of railroads, but to the strict constructionist of ante-bellum days this "dispose of" was limited by his general theory of the provinces of the federal government and the states. The public lands were also a source of revenue and to give them away would to that extent decrease the amount received from that direction and correspondingly increase taxation. Granting the interpretation of the Constitution which preceded it, Niles' argument seems sound. As the advocates of the bill held the same constitutional principles, they met it the only way open to them—by providing a return for the lands granted. This return was in the increase in the price of the lands and was to correspond exactly to the value of the lands granted. This resembles more a temporary expedient for meeting a constitutional difficulty than a true principle of interpretation. If the Democratic reading of the Constitution on internal improvements was the correct one, their argument in favor of land grants was a mere evasion of that document under an ingenious and plausible juggling of words. The true basis of land grants was national benefit, but

¹⁰ "The Federal government is a great land-owner; it possesses an extensive public domain; and we have the power under the Constitution to dispose of that domain; and a very unlimited power it is. The simple question is, what disposition we may make of the public lands? . . . We may bestow them for school purposes, or we may bestow a portion for the purpose of improving the value of the rest." Ibid., App., 536.

¹¹ "The question in this case is a very simple one. We are authorized by the Constitution to dispose of the public lands. Here is a public improvement . . . by which the value of the public lands would be enhanced. If then, it will add to the value, ought we not to contribute to it . . . ? I do not think that there is a principle more perfectly clear from doubt than this one is. It does not belong to the category of internal improvements at all. It is not a power claimed by the government as a government. It belongs to the government as a land proprietor. And I will add that it is not only a right but a duty and an important duty." Ibid., App., 537.

to take this ground required an extension of the "general welfare" clause which few at that time were willing to make.

The bill was ordered read a third time by a vote of 24 to 11. The states with public lands cast 14 votes for and 3 against it while from the states without lands 10 votes were cast for and 8 against. The opposition came chiefly from New England and the South, while the West voted solidly for it.¹² The measure was supported by both parties, the Democrats voting 14 for and 10 against, and the Whigs 10 for and 1 against.

In the House the bill came up August 12. Callamer, of Vermont, thought that the company ought not to be allowed to go off its line for the selection of lands, and offered an amendment to that effect which was adopted. Under the previous question a vote was then taken and a third reading refused, 74 to 78 according to the *Globe*¹³ or 73 to 79 according to the *Journal*.¹⁴ The South furnished most of the opposition; nearly all of the Middle States were divided, while in the West Ohio cast 9 votes against the bill.¹⁵ On party lines the vote stood 30 Democrats for and 42 against the bill, and 43 Whigs for and 37 against. Here, as in the Senate, the bill was rather more of a Whig than a Democratic measure, but party lines were not closely drawn. It must also be remembered that the chief sponsor of the bill was a leading Democrat. An attempt was

	For.	Against.
¹² New England	2	3
Middle	2	1
South	2	3
Gulf	4	3
West (land)	10	0
West (non-land)	4	1

Senate Journal, 1st sess. 30th Cong., 314.

¹³*Globe*, 1st sess. 30th Cong., 1071.

¹⁴*House Journal*, 1st sess. 30th Cong., 1270.

	For.	Against.
¹⁵ New England	10	5
Middle	25	22
South	7	31
Gulf	3	4
West (land)	27	9
West (non-land)	1	8
<i>Ibid.</i>		

made to reconsider the vote the following day but the motion was laid on the table 78 to 64.¹⁶

In asking why the bill failed to pass, we must remember the problem which confronted the advocates of the bill in their endeavor to secure favorable action by the House, and the difference between the conditions there and in the Senate. In the House the members from the states which contained public lands were largely in the minority while in the Senate the representation from the two sections was almost the same, the non-land states having 140 representatives as against 90 from the land states and 32 senators as against 28. A very few votes from the old states would pass such a bill in the Senate but a considerable number must be secured in order to achieve success in the House. It would be incorrect to represent the matter as entirely a sectional one, but in general the interests of the old and new parts of the country were diverse when questions of land policy were concerned. It was therefore necessary to win over a number of members from the non-land states, and the friends of the Illinois Central bill had as yet failed to do this. Influences were already at work in this direction. Some of the eastern members may have been influenced by their western interests, but the growing connections between the East and the Mississippi valley acted with the most power in securing eastern votes for western enterprises.

At the short session of the Congress Breese secured action on his pre-emption bill, which passed the Senate without opposition. Douglas stated that he withdrew his opposition to the bill on the understanding that it could not pass the House.¹⁷ It, however, almost became a law, but the close of the session prevented decisive action.¹⁸

Breese was succeeded in the thirty-first Congress by General

¹⁶ Douglas was in error when he stated in his letter to Breese of Jan. 5, 1851, that the bill was laid on the table in the House.

¹⁷ Douglas to Breese, Jan. 5., 1851, l. c., 74. Compare Breese to Douglas, Jan. 25, 1851, *Springfield Weekly Register*, Feb. 6, 1861. Reprinted in *Fergus Hist. Ser.*, No. 23, pp. 76-89.

¹⁸ See *House Journal*, 2d sess. 30th Cong., 537, 670; compare *Globe*, 2d sess. 30th Cong., 616, 698.

Shields, who was not apt to be of great assistance in any matter requiring delicate political management, but who would at least not hinder Douglas in the efforts which he might make towards a land grant for the Illinois Central. Felch, of Michigan, succeeded Breese as chairman of the committee on Public Lands. At the beginning of the session Douglas introduced a bill similar to the one which had previously passed the Senate. When it was called up for consideration, King, of Alabama, introduced an amendment making a similar grant to Alabama and Mississippi for a road from Mobile to the mouth of the Ohio.¹⁹ This amendment was not simply the insertion of a separate grant but the continuation of the previous grant to the Gulf, thus increasing the national importance of the undertaking and tending to secure the support of the South as well as of the West.

The first opposition to the bill came from Walker, of Wisconsin, who considered it a tax on the settlers for the benefit of the railroads. He said that he favored granting the lands to the settlers themselves,²⁰ and moved to strike out that part of the bill increasing the price of the sections reserved to the government, but as this increase in price was the essential feature of the "land-owner" theory of land grants the amendment was rejected.²¹ Walker's position was that which was finding expression at this time in the movement for the homestead bill, and shows the antagonism between that system and the grants for railroads. A more detailed examination of the conflict between the two systems will be made later, but we may note at this point that such a division between the members from the land states argued ill for the success of either measure. But as Walker's plan did not

¹⁹ *Globe*, 1st sess. 31st Cong., 845. The statement by Douglas that this amendment was made at his suggestion may have some truth, but the greater part of the story is manifestly improbable. The value of the book by Cutts, *Short Treatise on Constitutional and Party Questions*, is discussed in Appendix B.

²⁰ "It amounts, then, to a tax upon the actual settlers to that amount [\$1.25 an acre, the increase in the price of the lands under the bill] in order to build the road. This is one of the greatest embarrassments to the settlement of the new states. I know of nothing that would embarrass the settlement of these states more than increasing the price of the public lands. . . . I am in favor of granting the whole of this land to the states to be given to actual settlers at the cost only of surveying it." *Globe*, 1st sess. 31st Cong., 845.

²¹ *Ibid.*, 852-3.

find favor with the rest of the Senate, it did not now endanger the land grant bills. The only other point brought out in the discussion was the objection made by Bradbury, of Maine, in regard to the location of lands at a distance from the road in lieu of those already sold by the government.²² This was discussed at some length and an amendment restricting the grant to six miles on each side of the road was lost 15 to 23.²³ The amendment offered by King was adopted without division²⁴ and the bill went over to the next day.²⁵

A glance at the map will show that the bill did not provide for a complete line from Chicago to Mobile. Between Illinois and Mississippi lie Kentucky and Tennessee, states without public lands and therefore not included in the bill. When the Senate considered the bill the next day, Bell, of Tennessee, called attention to the lack of a connecting link in the system and offered an amendment which provided that Kentucky and Tennessee should be given a part of the lands in the other states in proportion to the length of line in the various states, for a continuation of the Mobile and Ohio railroad.²⁶

Nothing illustrates the theory of the land grants better than the reception of this amendment. King asked Bell to withdraw it as it would probably defeat the whole bill. He said that it proceeded on a different principle, as the road in Kentucky and Tennessee would not increase the value of any public lands.²⁷ To this objection the answer was made by Miller, of New Jersey, that if a road from Chicago to Cairo increased the value of lands

²² "If the lands have been sold, then the selection is to be made from other lands not upon the road, but quite remote from the road, and so remote that the principle upon which the bill is advocated cannot fairly apply." Ibid., 847.

²³ Ibid., 854.

²⁴ Ibid., 851.

²⁵ For debate, see Ibid., 844-54.

²⁶ "So to amend the bill that a proportion of the net proceeds of the lands given to the state of Illinois and the states of Alabama and Mississippi be secured to the states of Tennessee and Kentucky respectively, equal to the proportion of the entire line of the railroad proposed to be constructed from the southern terminus of the Illinois and Michigan canal to the city of Mobile, which passes through each of the two latter states, to be applied by them to the construction of the sections or divisions of the road within their respective jurisdiction." Ibid., 808.

²⁷ Ibid.

in Illinois, and a road from Mobile to the boundary of Mississippi increased the value of lands in Alabama and Mississippi, the complete line from Mobile to Chicago ought to still further increase the lands in all those states.²⁸ The amendment was, however, defeated without a division.²⁹ That such an amendment would only continue the idea of the original bill, even on the "land-owner" theory of the grant, seems clear. But the constitutional basis of the support of the bill was not strong enough to carry such an extension of the principle. This fact illustrates the essential weakness of the position taken by those favoring the bill. Forced to accept a strict construction of the Constitution, they had to evolve an unnatural argument and could not follow that argument to its logical conclusion but were constantly forced into inconsistencies.

Dayton, of New Jersey, attempted to bring in a new question by an amendment providing for the distribution of the proceeds of the public lands, after the land grant, in the manner provided by the Distribution Bill of 1841.³⁰ This was defeated 12 to 30. All those favoring the amendment were Whigs while only five Whigs voted against it.³¹ The votes for it were nearly all from the East.

Jefferson Davis expressed the sentiment which had been heard in the previous debates in regard to the indemnity limits by offering an amendment restricting such lands to within fifteen miles of the road. He considered that such a distance was the limit of the road's influence as this was as far as a loaded team could go and return in a day.³² What became of this important amendment is not clear. Davis said that he would not press it and the

²⁸ "Gentlemen say that we have the right to donate to the state of Illinois the public lands for building this road within that state, but the moment the great public highway crosses her line we have no right to assist in the completion of this work! In other words, we, holding this domain, have a right to assist in building the road in the state where the lands lie, but the moment we cross that line our power ceases. This is a partial administration of the public property which I cannot comprehend." *Ibid.*, 869.

²⁹ *Ibid.*, 900.

³⁰ *Ibid.*, 871, 873.

³¹ They were Smith (Conn.), Badger and Mangum (N. C.), Bell (Tenn.), and Morton (Fla.). *Ibid.*, 900.

³² *Ibid.*, 902.

bill was reported from the committee of the whole without it.³³ The *Journal* throws no light upon it,³⁴ and it was not inserted in the House. Yet it appears in the bill as published and was incorporated in the subsequent acts on the subject. The effect of this change was considerable. By the original bill the company could replace lands previously disposed of within the limits of the grants by the nearest public lands, and could go to the boundaries of the state, if necessary, in making its selections. But under the amendment the lands could only be replaced by vacant lands more than six and less than fifteen miles from the road. If lands could not be secured within those limits the company had to do without them. This amendment, apparently irregularly passed, affected not only the Illinois Central act but all others, as the later bills were drawn up on the model of the first one. If the amendment slipped in by a clerical error it was probably the most far-reaching mistake of that nature ever made by Congress.

The bill passed the Senate 26 to 14. The sectional division was very similar to that of the previous Congress except that the vote of Ohio was divided and New York and Pennsylvania both favored the bill.³⁵ Both parties supported it, the Democrats voting 18 to 6 and the Whigs 8 to 7.³⁶

The reading of the *Globe* gives one the impression that much interest was taken in the bill, yet it is scarcely mentioned in the newspapers of the year. This was the time of the Compromise of 1850 and there was little time for economic discussions. On April 30th, Pike wrote to the New York *Tribune* that "the de-

³³ "Mr. DAVIS: Well, if no one else objects, I shall not press my amendment. "There being no further propositions to amend, the bill was reported back to the Senate; and the amendments of the committee concurred in." *Ibid.*, 904.

³⁴ *Senate Journal*, 1st sess. 31st Cong., 320-1.

	For.	Against.
New England	1	4
Middle	2	4
South	2	3
Gulf	5	1
West (land)	13	1
West (non-land)	3	1

Globe, 1st sess. 31st Cong., 904.

³⁶ There was one free-soil vote, cast by Chase, of Ohio, against the bill.

serted seats of the Senate were in the course of today addressed by Mr. Benton, who made some brief and beautiful remarks in favor of the bill making a donation of alternate sections of the public lands to aid road-making in Illinois."³⁷

The bill came up in the House with a favorable report from the committee on Public Lands, but was laid aside several times. On September 17 it was passed, under the previous question, 101 to 75. As before, it was opposed by the South, New England was almost exactly divided, and the Middle states were slightly in favor of it.³³ There were 52 Whig votes for and 28 against the bill. Comparing this vote with that of the previous Congress we find that there has been a change of three votes in the Middle States, one in the South, ten in the Gulf States, and five in Tennessee and Kentucky.

What caused the change in the vote? The most obvious cause is the incorporation of the Mobile and Ohio road in the bill as there was a gain of fifteen votes from the states likely to be benefited by this road. If Douglas really originated this idea the passage of the bill may be said to have been due to him alone. An explanation of the change in some of the eastern votes is given by John Wentworth, then a member of the House from Illinois. He states that there had been opposition to land grants from the old states on account of fears of western emigration and among the Whigs who wished a distribution of the proceeds of the land sales. Through the holders of the old canal bonds, mostly eastern men and Whigs, and with the aid of Webster and Ashmun in return for concessions on the tariff, the passage of the

³⁷ *New York Weekly Tribune*, May 11, 1850.

	For. Against.	
³³ New England	10	11
Middle	28	22
South	8	23
Gulf	13	0
West (land)	34	12
West (non-land)	8	7

House Journal, 1st sess. 31st Cong., 1490. Walker, of Wisconsin, stated that the Senators and Representatives from his state were acting under a memorial from the legislature and that he did not believe that any of them were in favor of land grants. *Globe*, 1st sess. 31st Cong., 1766.

bill was secured.³⁹ There was certainly an increase in the Whig vote in favor of this bill and Breese hints at some such bargain in his letter to Douglas of January 25, 1851.⁴⁰ There also appears to be a confirmation of this in the action three days later on the bill granting lands for a railroad in Florida. When this bill was received from the Senate Cabell said that it had been his intention to move the immediate passage of the bill but as his tariff friends were in such a bad humor at the defeat of their bill that morning he would not do so. He said that he did not think that the sins of the Democratic side of the House should be visited upon him. (He was a Whig.)⁴¹

Another element which probably influenced the East was the branch to Chicago which connected the Mississippi river traffic with the trade from the East by way of the Great Lakes and the railroads which were just being constructed. Douglas attached great importance to this feature of the bill.⁴² The system was as comprehensive a one as could well be devised, connecting as it did the Northwest, South, and East. To this comprehensiveness must be attributed in great part the success of the measure. Of minor importance was the political astuteness of the friends of the bill. The fate of the other land grant bills was such as to show that a combination of exceptional circumstances was necessary at this time to enable such a bill to secure the approval of the House.⁴³

The only thing of importance in connection with the other land grant bills considered at this session was an amendment offered by King, of New Jersey, to the bill making a grant for a

³⁹Wentworth, *Congressional Reminiscences*, *Fergus Hist. Ser.*, No. 24, pp. 40-42.

⁴⁰"It was the votes of Massachusetts and New York that passed the bill, and you and I know how they were obtained." *Springfield Daily Register*, Feb. 6, 1851; *Fergus Hist. Ser.*, No. 23, p. 89.

⁴¹*Globe*, 1st sess. 31st Cong., 1953.

⁴²"It was the Chicago branch . . . connecting the main road with the various lines in progress of construction, from Philadelphia, New York, Boston, and Portland, as well as the great chain of lakes and the St. Lawrence, which secured the votes we obtained from Pennsylvania, New York and New England." Douglas to Breese, Feb. 22, 1851; *Fergus Hist. Ser.*, No. 23, p. 96.

⁴³Other bills were acted on as follows: Hannibal and St. Joseph, laid on the table, 91 to 81, *Globe*, 1st sess. 31st Cong., 1951; Missouri Pacific, laid on the table, 102 to 65, *Ibid.*, 1952; others not considered.

road from Hannibal to St. Joseph. This provided that none of the lands should be transferred to any corporation, company, or individual, but should be used by the state directly, the profits to be applied to the school fund.⁴⁴ This, together with the bill, was laid on the table. Young, of Illinois, submitted a similar amendment to another bill which was disposed of in the same manner.⁴⁵

By this time the arguments for and against land grants had been well defined. They were to develop in certain directions, but little new was to be added by subsequent discussions. The chief argument for the land grant was that the government was a great landed proprietor. Subordinate to this was the claim by the various states for a share in the public lands, on the theory both of a proportional distribution and of compensation due the new states on account of the exemption of the lands from taxation. Against the grants were, first, the constitutional argument, that they were only internal improvements in a veiled form, and the objection from the standpoint of the settler that the desirable lands were raised in price. From the idea that the states were entitled to a share in the public lands, came the plea for a general grant of lands; and from the settlers' argument came the agitation for the homestead law.

⁴⁴ Ibid., 1951.

⁴⁵ Ibid., 1952.

CHAPTER III.

THE EAST AGAINST THE WEST — LAND GRANTS AND
HOMESTEADS.

The effect of the Illinois Central grant on legislation was not felt at once, and little was done in regard to the matter during the second session of the thirty-first Congress. But at the beginning of the next Congress, bills were introduced granting lands to railroads in nearly all of the states which had public lands. The Commissioner of the Land Office estimated that the bills introduced in the Senate provided for 3,090 miles of road, and grants amounting to 13,901,657 acres.¹ Other estimates were much higher. Not only were many more bills introduced; the interest in the bills was much greater than at the previous Congress. Pike wrote to the *Tribune*, February 10, 1852, "This question of grants of the public lands is engrossing, and is likely to engross much of the time of the session. It is in fact the great leading topic of interest."²

It is not worth while considering these bills in detail. The argument for land grants has been discussed in the previous chapter. A noteworthy development was, however, made by Charles

¹ States.	Length of road, miles.	Grant, acres.
Michigan	534	341,760
Wisconsin	156	599,040
Iowa	434	3,104,417
Missouri	232	890,880
Arkansas	488	1,873,920
Alabama	314	1,205,760
Florida	932	3,882,880
Total	3,090	13,901,657

Globe, 1st sess. 32d Cong., App., 428.

² *Semi-Weekly Tribune*, February 24, 1852. On June 10, Orr claimed in the House that the committee on public lands had occupied most of the morning hour for the previous three or four months. *Globe*, 1st sess. 32d Cong., 1551.

Sumner in his speech on the Iowa bill. Attention had been called before to the fact that the states had not been allowed to tax the public lands within their limits and that something was due the states on this account. Sumner worked out the proposition mathematically, claiming that the grants to the states would no more than compensate for the money which might have been obtained had the lands been subject to taxation. He attempted to estimate the amount of these taxes and found some \$60,000,000 due the states from the government.³ This argument was answered by Hunter, of Virginia, who claimed that an estimate of a tax of one cent an acre on lands which could not be sold for \$1.25 was too high. He also claimed that the exemption of the public lands from taxation had been compensated for by the administration of the territories at the expense of the general government, by the sections granted for the use of schools, the 5 per cent. of the proceeds of the lands, and by the lands granted for internal improvements.⁴ Felch, of Michigan, advanced the same argument as Sumner, and also objected to the government as a land owner in the states. He claimed that the new states did not have the powers of sovereignty over their own soil, and could not exercise the right of eminent domain or assess government lands for benefits due to state action.⁵ In the House an opposition to corporations developed and the method by which Illinois disposed of her lands was criticised.⁶ An attempt was made to meet this objection by providing that the lands should not be transferred to a corporation but should be sold to actual settlers only, the profits to be applied to the support of schools.⁷ This amendment was not adopted.

At this session of Congress fifteen land grant bills passed the Senate and only one the House. On only one of the Senate bills

³ *Ibid.*, App., 136-36. The exemptions from taxation which the government lands enjoyed was one of the terms on which the new states had been admitted to the Union and existed only on account of this compact. *Witherspoon v. Duncan*, 4 Wallace, 210.

⁴ *Globe*, 1st sess. 32d Cong., App., 203.

⁵ *Ibid.*, App., 149.

⁶ *Ibid.*, 75-77.

⁷ *Ibid.*, 545-46.

was a vote taken. This was the grant to Iowa which passed 30 to 10.⁸ In the House the bill for the south-west branch of the Pacific passed 103 to 76 and the next day the Iowa bill was laid on the table 102 to 68. There were twenty-six persons who voted for the former bill and against the latter, the change being largely for the New England and Middle States. The Missouri bill received the support of these states and the West, but Massachusetts (8-0), Pennsylvania (14-6) and Maryland (3-1) were the only eastern states favoring it.⁹ The Iowa bill was opposed by those three states, no eastern states giving a majority for the measure.¹⁰ It appears that Iowa was not a unit in favor of the bill, as some of the river towns feared that the railroads would divert trade from the river and thus injure them.¹¹ But it is evident that an explanation must be sought for the passage of the Missouri bill, as that was the exception to the general rule. The Democrats cast 49 votes for the Missouri and 36 for the Iowa bill, with 62 votes against the former and 68 against the latter. Of the Whig votes 51 were for the Missouri bill and 31 for the Iowa bill, with 14 against the former and 33 against the latter.

This session of Congress was also marked by an effort of the eastern states to secure a portion of the public lands for their own use. When the Iowa land grant bill first came up in the Senate,

⁸ The votes against were from Maine (2), New Hampshire, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, and Ohio (2). *Senate Journal*, 1st sess. 32d Cong., 284.

	For.	Against.
⁹ New England	12	8
Middle	36	23
South	6	31
Gulf	12	2
West (land)	40	1
West (non-land)	9	10

House Journal, 1st sess. 32d Cong., 749.

	For.	Against.
¹⁰ New England	2	16
Middle	10	34
South	6	29
Gulf	10	2
West (land)	29	14
West (non-land)	11	7

Ibid., 155.

¹¹ See letter of Pike, *Sent-Weekly Tribune*, March 9, 1852, and speech of Senator Bradbury, Jan. 17, 1853, *Globe*, 2d sess. 32d Cong., 318.

Underwood, of Kentucky, proposed an amendment granting to the states which had no public lands specified amounts of the lands in the other states. These lands were to be used for education and internal improvements.¹² Hunter objected to this on the ground that the holding by one state of lands in another would cause trouble between the states.¹³ Underwood claimed that it was no worse for a state so to hold lands than it was for the general government. He cited the settlement of the boundary dispute between Kentucky and Tennessee where the former was given the land and the latter the political jurisdiction.¹⁴ The amendment was defeated 15 to 26. Of those favoring it 13 were Whigs while 21 Democratic votes were cast against it.¹⁵ In the House a similar attempt was made. Bennett, of New York, moved to re-commit the Hannibal and St. Joseph land grant bill, with instructions to amend so as to secure a grant to the various states in proportion to their representation in Congress, the amount granted to Illinois being taken as a unit. The land states were to have double the proportion of the others.¹⁶ The motion was lost 70 to 96.¹⁷ Bennett then reported a bill from the committee on Public Lands, making specified grants to the land states for railroads; to the non-land states, except Texas, 150,000 acres for each senator and representative, for the support of schools; and to the territories and the District of Columbia 150,000 acres each.¹⁸ There was little discussion on this bill and it was ordered read a third time by a vote of 95 to 92. The opposition to the bill was

¹² *Globe*, 1st sess. 32d Cong., 390.

¹³ "What does the amendment propose, Mr. President? It proposes to establish the old states as landholders in the bosoms of the new states—a measure that could not fail to sow the seeds of dissension and discord between the several state of the Confederacy." *Ibid.*, App., 204.

¹⁴ *Ibid.*, App., 222-26.

¹⁵ *Senate Journal*, 1st sess. 32d Cong., 281.

¹⁶ *Globe*, 1st sess. 32d Cong., 632-3.

¹⁷ *Ibid.*, 670.

¹⁸ The amounts to the land states were as follows: To Missouri, Iowa, Arkansas, and California, 3,000,000 each; to Alabama, Michigan, Wisconsin, and Louisiana, 2,500,000 each; to Mississippi and Florida, 2,000,000 each; to Illinois, 1,000,000; to Indiana, 1,000,000, and all unappropriated public lands within the state; to Ohio, 2,000,000, and all unappropriated public lands in the state. *Ibid.*, 1536.

largely from the South and West.¹⁰ On party lines the Whigs voted 66 to 4 for the bill while the Democrats stood 26 to 87 against it.

In the Senate the bill was reported adversely by the committee on Public Lands and a motion to take it up was lost, 22 to 23. New England was quite evenly divided on the bill, otherwise the sectional division was much the same as in the House,²⁰ as was also the vote by parties, the Whigs being 15 to 1 for the motion and the Democrats 20 to 6 against. The explanation of these votes may be found in the opposition of the Democrats to any general system of internal improvements and to the old plan of the Whigs for a distribution of the proceeds of the land sales.²¹

Bennett's plan was an effort to settle the railroad land grant question, and indeed many features of the general land policy, on a permanent and equitable basis. Whether the old states were entitled to share in the public lands is perhaps outside of the present discussion, but as a matter of fact they had received such a share from the beginning in the money which came into the treasury from land sales. If they were to give up this revenue on account of grants in aid of enterprises in the new states they could with plausibility claim some share in the lands them-

	For.	Against.
¹⁰ New England	19	2
Middle	35	13
South	16	27
Gulf	2	10
West (land)	15	30
West (non-land)	8	10
Ibid., 1863.		
	For.	Against.
²⁰ New England	6	5
Middle	5	1
South	3	5
Gulf	4	2
West (land)	3	7
West (non-land)	1	3

Senate Journal, 1st sess. 32d Cong., 660.

²¹ It was charged that the Whigs wished a speedy disposition of the public lands, so that an increase in the tariff would be necessary. *Globe*, 1st sess. 32d Cong., App., 238. A railroad convention, held at St. Louis, November 15, 1852, protested "against giving them [the public lands] away to any one class of the people or assigning them wholesale to the old states, as provided for by the 'Homestead' and 'Bennett's' land bills." *Proceedings of Mississippi Valley Road Convention*, 12.

selves. True, the theory of the railroad grants had provided for this in the increase in the price of the reserved lands, but as we have seen, this theory was more or less of a make-shift. In Bennett's bill the broader basis of making a general grant to the states was adopted without complications of reserved and indemnity lands. How this would have worked in practice we cannot tell, but the workings of the other system were not such as to commend it, so that some slight improvement could be expected. Of course, even if the plan had been adopted the other system of specific grants might have continued, but this was not likely. So far as we can see, Bennett's plan was an improvement on the other in that it was general and permanent and aimed to put an end to lobbying in behalf of special bills; and in that it made general grants to the states, leaving the special disposition of the lands to the legislatures. But instead of accepting this solution of the question the special legislation was continued and the opportunity was lost of avoiding many of the evils which were attendant on that legislation.

The sectional divisions noted in the votes on the different bills were brought out strongly in a discussion over a report on the Iowa bill, made April 1, 1852, by Henn, of Iowa. After reporting the bill from the committee on Public Lands he said: "I think that the time has come when the members of the House from the West should stand up and vote with each other upon all these propositions." He went on to charge the eastern members with sectionalism in their votes on measures before Congress. Venable, of North Carolina, claimed that there had been no disposition on the part of eastern members unduly to favor their own schemes.²² The next day Henn elaborated his position, showing opposition on the part of the East to the Missouri bill on motion to refer the bill to the Committee of the Whole.²³ This same bill, however, afterwards passed the House.

²² *Globe*, 1st sess. 32d Cong., 950.

²³ *Ibid.*, 961-62.

For a correct understanding of railroad land grants it will be necessary to trace in some detail the history of another feature of our public land system—the homestead law. The first, although very imperfect expression of this principle was found in an act of 1842, called the “Florida Donation Act.”²⁴ This granted to each actual settler in that territory a quarter section of land on the conditions of actual settlement and the cultivation of a portion of the land. At that time the new territory was in terror of the Indians, and it was felt that some inducement was needed to promote settlement there. It was argued that this donation would in fact be to the financial profit of the government by making settlement safer and thus causing the sale of other public lands.²⁵ Very similar acts were passed in 1850 for the territory of Oregon, in 1853 for Washington and in 1854 for New Mexico.²⁶

The high-water mark in the sales of the public lands was reached in 1836. The fact that the government possessed many acres of land which it could not dispose of led to attempts to reduce and graduate the price of the lands. At first such attempts were favored on the ground of the advantage which they would bring to the government, simply as a business proposition. But in 1846 the idea that such a reduction in price should be made on account of the settler was advanced.²⁷ Darragh, of Pennsylvania, introduced in the House an amendment to a graduation bill, providing that lands which had been subject to entry for ten years should be given to actual settlers after three years’ occupation. This was an approach toward the later homestead law, but the House was not ready for such a step, and the amendment was rejected,²⁸ as was one offered by Andrew Johnson granting a quarter section to destitute heads of families after four years’ occupation.²⁹ The claim which Johnson later made to the

²⁴*Statutes at Large*, V, 502.

²⁵*Globe*, 2d sess. 27th Cong., 623-24, 764-66.

²⁶ See Donaldson, *Public Domain*, 295-7.

²⁷*Globe*, 1st sess. 20th Cong., 1038-63.

²⁸*Ibid.*, 1077.

²⁹*Ibid.*

fatherhood of the homestead law seems to be justified by the action which he took at this time.

We hear little of homesteads or graduation bills during the next Congress, but in the thirty-first Congress two distinct propositions were brought forward looking toward the donation of the public lands to actual settlers. Douglas proposed to grant 160 acres of land to actual settlers who should take up a residence upon and cultivate the land for a period of four years.³⁰ Walker, of Wisconsin, wished to cede to the new states the public lands on condition that they be granted to actual settlers, in limited quantities, for the cost of administration.³¹

To both of these propositions the committee on Public Lands made the same general objections. The point of view taken was that the public lands were to be administered for the benefit of the treasury as they were pledged to the payment of the public debt. It was also argued that the large quantity of free lands suddenly placed upon the market would reduce farm values in the new states and also the value of the grants made in favor of internal improvements.³² In this last objection may be found one of the sources of the conflict which was to arise later between land grants and homesteads. The chief discussion over the report was during the second session of this Congress.

Two resolutions were introduced at this time; one by Webster declaring the right of each male citizen to a homestead of 160 acres after three years' cultivation,³³ and the other by Houston, of Texas, declaring that each family not worth \$1,500 was entitled to 160 acres of land after three years' cultivation.³⁴ The discussion over these resolutions developed the connection between the revenues from the public lands and the tariff, and was mixed up with the discussion of Seward's resolution for grants to Hungarian exiles.³⁵ In the House Andrew Johnson

³⁰ *Senate Journal*, 1st sess. 31st Cong., 36.

³¹ *Ibid.*, 116.

³² *Senate Reports*, 1st sess. 31st Cong., No. 167.

³³ *Globe*, 1st sess. 31st Cong., 210.

³⁴ *Ibid.*, 232.

³⁵ *Ibid.*, 264-66.

introduced two homestead bills, which were not discussed at any length.

With this agitation in favor of homesteads we may connect the objections made to the increase in the price of the lands reserved to the government in the grants to railroads.³⁶ That the homestead doctrine was opposed to the land grant system was evident from the report of the public lands committee. The antagonism of the two systems will be observed during the later history of the homestead law.

Outside of Congress the feeling in favor of grants to actual settlers was becoming manifest. The Buffalo convention of 1848 had declared for "free soil" in an economic as well as a political sense,³⁷ and the Free-soil convention of 1852 reaffirmed this in stronger terms.³⁸ During 1850 and 1851 there were resolutions transmitted to Congress from the legislatures of New York,³⁹ Missouri,⁴⁰ Illinois,⁴¹ and Indiana,⁴² favoring grants of land to actual settlers. Probably the strongest expression of the anti-land grant sentiment from the settler's point of view came from Wisconsin. In his message to the legislature of that state in 1852, Governor Farwell objected to grants as restraining the development of the state by removing valuable portions of the public lands from settlement.⁴³ Eastman, one of Wis-

³⁶Supra, p. 31.

³⁷"Resolved, That the free grant to actual settlers, in consideration of the expenses they incur in making settlements in the wilderness, which are usually fully equal to their actual cost, and of the public benefits arising therefrom, of reasonable portions of the public lands, under suitable limitations, is a wise and just measure of public policy which will promote, in various ways, the interests of all the states of this Union." Stanwood, *History of Presidential Elections*, 175.

³⁸"The public lands of the United States belong to the people, and should not be sold to individuals nor granted to corporations, but should be held as a sacred trust for the benefit of the people, and should be granted in limited quantities, free of cost, to landless settlers." Ibid., 188.

³⁹*House Misc. Docs.*, 1st sess. 31st Cong., No. 23.

⁴⁰Ibid., No. 29.

⁴¹Ibid., 2d sess. 31st Cong., No. 6.

⁴²*Senate Misc. Docs.*, 1st sess. 31st Cong., No. 86.

⁴³"These large grants of the public lands to the states, in trust for the benefit of specific works of internal improvement under the supervision of private incorporated companies, will retard the settlement of the state, by engrossing the most valuable portions of the public lands, and, in every instance, will probably have the effect to keep them out of immediate market, as well as to increase the cost to the settler when offered for sale." *Assembly Journal*, 5th sess., 30-31.

consin's representatives, said that this message did not represent the sentiment of the state;⁴⁴ certainly the governor was not supported by the legislature in this position.⁴⁵ The more advanced ground which Wisconsin took in this matter may be due to the large increase in its population between 1840 and 1850. During these ten years there was an increase from 30,945 to 305,391, or 886 per cent. During the same time Illinois grew from 476,183 to 851,470 or 79 per cent., Michigan from 212,267 to 397,654 or 87 per cent., and Iowa from 43,112 to 129,214 or 199 per cent.

During the thirty-second Congress the two ideas regarding the disposal of the public lands came into conflict more strongly than at any other time. On March 17, Pike wrote to the *Tribune* that the House would stop the land grant bills, but that compromises might be formed with those who were opposed to the system, but who were more opposed to grants to settlers.⁴⁶ It was stated in the House that the only formidable opposition to the homestead bill came from those who favored land grants;⁴⁷ and the opposition to the land grants by the advocates of the homestead bill was said to be caused by the fear that the grants would take up large tracts of land.⁴⁸ Thomas A. Hendricks admitted the opposition, but considered it ill-founded as the two measures were necessary to the development of a new country.⁴⁹

The homestead bill, in the form it was introduced and passed the House, provided that any vacant public lands could be entered under its provisions. This would of course include the reserved lands of the railroad grants and thus the effect on the value of the lands granted to railroads and the theory on which those grants were made was much greater than it would have been if such lands were reserved from the action of the law.

⁴⁴ *Globe*, 1st. sess. 32d Cong., App., 431.

⁴⁵ See Madison correspondence in the *Milwaukee Sentinel*, January 20, 1852.

⁴⁶ *Semi-Weekly Tribune*, March 19, 1852.

⁴⁷ *Globe*, 1st sess. 32d Cong., App., 574.

⁴⁸ *Ibid.*, App., 737.

⁴⁹ *Ibid.*, App., 482.

The house passed the homestead bill at this session 107 to 56,⁵⁰ while the Senate twice refused to take it up for discussion, first by a vote of 14 to 31,⁵¹ and then by a vote of 16 to 38.⁵² In the House the only section to oppose the bill was the South, the free states voting for the bill 73 to 23 and the slave states for it 34 to 33.⁵³

In the Senate all sections of the country except the West were opposed to the bill. On the first vote Arkansas was the only slave state to vote for the bill while on the second vote Louisiana was alone in her support. On the other hand the free states cast 15 votes on the first motion and 14 on the second against the bill.⁵⁴

A comparison with those representatives who voted on both the homestead act and the bill granting lands to Iowa,⁵⁵ shows 131 voting on both bills. Of these two favored the land grant and opposed the homestead bill, 51 favored both bills, 35 were for homesteads and against land grants and 43 against both systems. In the Senate a similar comparison shows 17 for the Iowa bill⁵⁶ and against the homestead bill, 9 for both measures, 2 against land grants and favoring homesteads and 7 against both bills.

⁵⁰ *House Journal*, 1st sess. 32d Cong., 705.

⁵¹ *Senate Journal*, 1st sess. 32d Cong., 586.

⁵² *Ibid.*, 618.

	For.	Against.
⁵³ New England	12	8
Middle	27	9
South	4	28
Gulf	10	1
West (land)	39	6
West (non-land)	15	4

House Journal, 1st sess. 32d Cong., 705.

	For.		Against.	
	I.	II.	I.	II.
⁵⁴ New England	2	4	8	7
Middle	2	2	4	4
South	0	0	8	10
Gulf	0	1	5	6
West (land)	10	9	4	6
West (non-land)	0	0	4	5

Senate Journal, 1st sess. 32d Cong., 586, 618.

⁵⁵ *House Journal*, 1st sess. 32d Cong., 755.

⁵⁶ *Senate Journal*, 1st sess. 32d Cong., 284.

Combining both sets of figures we find that of 166 senators and representatives 56 were in favor of one and opposed the other measure, 60 were in favor of both plans and 50 were opposed to both. The division between the three opinions is thus almost equal.

CHAPTER IV.

LATER GRANTS TO STATES.

After 1853 there was a lull in land grant legislation. By the close of that year grants had been made to Illinois, Mississippi, Alabama, Missouri, and Arkansas to an amount estimated at about 8,000 acres.¹ If there was any sectionalism in the distribution of the grants, the South had received more than her share. Not until 1856 do land grants again become prominent in Congress, but during this time the homestead movement is fast gaining ground. On account of this neglect of land grants little light is thrown on the conflict between the two systems.

In the House a homestead bill was passed in 1854, by a vote of 107 to 72. The sectional groupings were not materially different from the vote at the previous session. The conflict with the slavery question had not yet developed and from the slave states 24 votes were cast for the bill, while 34 members from the free states voted against it. Both political parties favored the bill.²

In the Senate the bill was amended by a substitute which provided for a graduation in the price of the public lands; a general grant to the states for railroads, and the right of a head of a family to receive 160 acres of land at 25 cents an acre after five years' occupation.³ The substitute was adopted 34 to 13, being favored by both the friends and enemies of the homestead act.

When the bill had been introduced in the House it had provided for the entry of any vacant public lands. An amendment was introduced limiting the lands to which the law was applica-

¹ Donaldson, *Public Domain*, 273.

² *Globe*, 1st sess. 33d Cong., 549.

³ *Ibid.*, App., 1122.

ble to those held at \$1.25 an acre. Cobb, who moved the amendment, said he did so because to open up the reserved lands in the railroad grants who would have been to lose to the government the compensation for those grants.⁴ Bissell, of Illinois, said that he did not believe that it was the intention of any member of the House to apply the homestead law to the railroad lands,⁵ and an amendment similar in effect to Cobb's was adopted.⁶ This point was not discussed in the Senate.

The amendment to the homestead bill which was adopted in the Senate had provided that if a state should charter a railroad which ran through the public lands of the United States the Secretary of the Interior should set apart 7,680 acres a mile, within twelve miles of the road, these lands to be subject to pre-emption by the state at prices varying with the length of time the lands had been in the market, with a maximum of one dollar an acre.⁷ This part of the amendment was not discussed in the Senate nor was it brought up in the House.

The only land grant bill passed at this session of Congress was one to the territory of Minnesota. Some doubts were expressed as to the power of a territory to dispose of the grant and charter a company but the bill passed the House 99 to 71,⁸ the Senate without a division,⁹ and became a law June 29, 1854.¹⁰ About a month after the passage of the bill, Washburn, of Illinois, stated in the House that the bill as passed differed from the engrossed bill in an important particular. In a sentence which read "nor shall they [the lands] enure to the benefit of any company heretofore constituted or organized," the word *or* had been changed to *and*. It seems that there existed a company in Minnesota which by its charter was to receive any lands which Congress might grant in aid of a railroad along that route. It

⁴ *Ibid.*, 500-501.

⁵ *Ibid.*, 522.

⁶ *Ibid.*, 526.

⁷ *Ibid.*, App., 1122.

⁸ *Ibid.*, 1452.

⁹ *Ibid.*, 1552.

¹⁰ *Statutes at Large*, X, 302.

was felt that to pass a bill granting lands to Minnesota when it was known that a certain company would receive them would be making the grant to a corporation and not to the state. This was contrary to the theory of the grants which implied perfect freedom to the state in the exercise of its sovereignty over the lands granted to it. The provision quoted above had therefore been inserted to prevent the old company from receiving the lands. By the change noted, however, the company, which had not been fully organized until after the passage of the law, although chartered before, had set up a claim to the lands. On Washburn's motion a committee was appointed to investigate the matter.¹¹

Later in the day H. L. Stevens, from the committee on Public Lands, stated that he had intended to make the change before the bill was reported from the committee, but failing to do so and regarding it as merely verbal he had requested the clerk of the House to do so.¹²

The reports of the investigating committee agreed with Stevens' statement of the case and exonerated him of any wrong intention in his action. Bills were also introduced amending the act so that it would read as when originally reported from the committee.¹³ But instead of so amending the law the House passed a bill repealing the entire grant.¹⁴ This bill reached the Senate August 3. It was so late in the session that an immediate consideration was necessary. Objection being made to a second reading of the bill it appeared as if the grant might be saved to the territory. The objection was, however, overcome by offering the repeal of the law as an additional section to a private bill then under consideration.¹⁵ An effort was made by Douglas to amend the amendment so that the act would be restored to the form which the House had originally intended but this was lost

¹¹ *Globe*, 1st sess. 33d Cong., 1888-89.

¹² *Ibid.*, 1891.

¹³ *Ibid.*, 2094.

¹⁴ *Ibid.*, 2100.

¹⁵ *Ibid.*, 2172.

15 to 28. The amendment was then agreed to 36 to 10 and the bill passed.¹⁶ The bill was then sent to the House which passed it as amended,¹⁷ so that the grant was entirely repealed. The question of the validity of the repeal came before the Supreme Court, where its constitutionality was upheld on the ground that the territory could acquire no vested interests in the lands until the first twenty miles of the road had been constructed.¹⁸

The next Congress was the banner one for land grants. Florida, Alabama, Louisiana, Mississippi, Michigan, Wisconsin, Minnesota, and Iowa received lands estimated at over 19,000,000 acres.¹⁹ There was little discussion of constitutional questions in connection with these bills. The Iowa bill received the most attention and illustrates well the ideas of the time on the subject of land grants. It had been received from the House and the question was on its reference to the committee on Public Lands. Jones, of Iowa, opposed this and asked for immediate consideration, because if the bill were delayed the land along the proposed lines would be taken up on bounty warrants. Yulee, of Florida, considered that when the senators and representatives from a state were agreed on a land grant bill it was the duty of Congress to pass that bill without further question.²⁰

Foot, of Vermont, urged the reference to the committee in order that the parties interested might be heard, while Adams, of Mississippi, claimed that the only parties interested were the United States and Iowa. Crittenden, of Kentucky, thought that the committee should be given a chance to determine whether or not the roads were of national importance.²¹ Reference was finally refused and the bill read a third time and passed.²² A few days later Crittenden moved a reconsideration of the bill. He said that there was another road already begun

¹⁶ *Ibid.*, 2178.

¹⁷ *Ibid.*, 2118.

¹⁸ *Rice v. Minn. & N. W. R. Co.*, 1 Black, 358.

¹⁹ Donaldson, *Public Domain*, 269-70.

²⁰ *Globe*, 1st sess. 34th Cong., 1168.

²¹ *Ibid.*, 1168-69.

²² 31 to 9, *Ibid.*, 1173.

in Iowa on which some hundreds of thousands of dollars had been expended. He wished the bill referred to a committee so that the rights of this road could be considered.²³ There were already four roads provided for by the bill, but there was a long discussion, covering thirteen pages of the *Globe*, as to the right of this other road to a grant.²⁴ Reconsideration was refused, however, by a vote of 15 to 19.

There was little discussion over bills in the House as they usually went through under the previous question. Jones, of Tennessee, called attention to the fact that the original theory of the grants had been abandoned as they were being made to roads then under process of construction and which did not need the aid.²⁵ Letcher, of Virginia, expressed the feelings of some on the subject when he moved to amend the title of the Mississippi bill so as to read: "A bill for constructing works of internal improvements by means of the Federal Government of the United States."²⁶ At this time the only section which opposed the bills was the South, although Ohio was inclined to vote against them.²⁷

It was evident that a great change in regard to land grants had occurred in six years. The passage of the Illinois Central bill in 1850 was exceptional and only secured by a most fortunate combination of circumstances. But in 1856 the doctrine could be advanced that where a railroad was to be built through the public lands it was a matter of course entitled to an extensive portion of those lands to aid in its construction. The

²³ *Ibid.*, 1187.

²⁴ *Ibid.*, 1207-20.

²⁵ *Ibid.*, 1328-29.

²⁶ *Ibid.*, 1945.

²⁷ The vote on the Mississippi bill shows the sectional division:

	House.		Senate	
	For.	Against.	For.	Against.
New England	13	7	5	1
Middle	30	15	1	3
South	7	13	2	5
Gulf	13	1	5	0
West (land)	24	14	6	2
West (non-land)	5	9	3	0

House Journal, 1st sess. 34th Cong., 1379; *Senate Journal*, 1st sess. 34th Cong., 545.

Senate seems almost to have accepted this idea, although the House was much more conservative. But it can be said that Congress was approaching the point where nearly every applicant had a good chance of receiving a grant of the public lands. The causes which brought about this change are not entirely clear. The fact that some states had received grants enabled the others to set up a claim to the same favor, while the passage of each bill made easier the succeeding ones by the mere force of example. Moreover, it had been found useless to expect that the public lands would continue to be any considerable source of revenue, so that the financial value of the grants to the government was becoming less. Another possible cause was the growth of the union between the East and West, due to the economic development of those sections at the expense of the South. This is illustrated in the votes on the land bills.

One reason for the increase in land grants whose extent it is impossible to determine, is political corruption. The character of the congressmen who supported the earlier bills indicates that at that time no such charge could be brought against the chief friends of those measures, commanding as they did the support of Douglas, Cass, Sumner, Davis, Calhoun, and other leading senators. But in the period just before the war the political standards were much lower than in 1850. General legislative corruption was freely charged,²⁸ and it is very probable that land grant bills, involving as they did great corporate interests, were helped along by improper methods. An important charge to this effect was made by the correspondent of the *New York Tribune*, in 1854, in which he alleges great bargaining in connection with the land grant bills. R. J. Walker is mentioned as mixed up in one of the largest of the schemes.²⁹ The interest in land grants taken by congressmen from New England and the Middle States was also doubtless not uninfluenced by capitalists of those sections interested in the railroads of the interior.

The thirty-fifth Congress practically ended railroad land

²⁸ Rhodes, *History of United States*, III, 60.

²⁹ *N. Y. Daily Tribune*, March 11, 1854.

grants for some time. The crisis of 1857 stopped the construction of roads already begun or projected and prevented the formation of plans for building new ones. In 1858 a number of bills granting lands for railroads were introduced in the Senate but were laid on the table on the recommendation of the committee on Public Lands, it being considered inexpedient to act upon them at that time.³⁰

Without going into a discussion of the crisis of 1857, it may be stated that the great amount of railroad building of the previous years was one of its prominent causes. Wirth so considers it, and comments on the large increase in railroad building at this time.³¹ The same view is taken by both von Holst³² and Rhodes.³³ Up to 1857 about 5,000 miles of projected road had been aided by grants of government lands.³⁴ The entire railroad construction during the same period was 15,175 miles. The effect of the grants on the other roads was of course considerable, as many were begun in the hope of receiving land grants. Also the land grants stimulated railroad building in the very portion of the country least ready for it.

The crisis did not, however, prevent a vigorous debate over the homestead bill during the session of 1858-59. In the first session of the thirty-fifth Congress the bill was discussed at some length in the Senate, but little was brought out concerning its relation to land grants. The bill was finally postponed to the next session.³⁵ Before it came up again in the Senate, the House had passed a homestead bill by a vote of 120 to 76. The division of the vote was on the line between the free and slave states, rather than by the old sectional divisions. The only votes from the free states against the bill were from Pennsylvania, Ohio, In-

³⁰ *Globe*, 1st sess. 35th Cong., 2451.

³¹ Wirth, *Geschichte der Handelskrisen*, Frankfurt am Main, 1890, 335.

³² Von Holst, *Constitutional History of the United States*, VI, 104-10.

³³ "The most prominent element in bringing on the panic of 1857 was the expansion of credit, induced by the rapid building of new railroads and by the new supply of gold from California," Rhodes, *History of the United States*, III, 52.

³⁴ This is only an estimate of the number of miles of road provided for in the various land-grant bills. Not all of the roads so provided for were constructed.

³⁵ *Globe*, 1st sess. 35th Cong., 2426.

diana, and Illinois. On the other hand the only votes for the bill in the slave states came from Maryland, Tennessee, Kentucky, and Arkansas.³⁶ On party lines the division was also significant. The Democrats (I use the classification of the *Tribune Almanac*) stood 38 for and 60 against the bill, the Republicans 82 for and 1 against, and the Americans 15 against.

In the Senate a motion was made February 1 to take up the bill. On this the vote stood 28 to 28 and the vote of Vice-President Breckenridge, of Kentucky, decided the motion in the negative. On February 25 the bill to appropriate \$30,000,000 for the purchase of Cuba was before the Senate. During the evening, Doolittle, of Wisconsin, moved to take up the homestead bill.³⁷ Andrew Johnson, a staunch supporter of the bill, asked Doolittle to withdraw his motion as it was needlessly antagonizing the friends of the Cuba bill. Douglas and Rice made similar requests.³⁸ A speech of Toombs accusing the opponents of the Cuba bill with cowardice called forth the report of Wade, "The question will be, shall we give niggers to the niggerless, or lands to the landless?"³⁹ What seemed at first only a struggle for precedence between the bills was in fact a contest between two opposing doctrines.⁴⁰ The motion to take up the bill failed.⁴¹ A number of votes from the free states were found in opposition to the motion,⁴² while only one vote from a slave state, that of Johnson, of Tennessee, was cast in favor of it. It was then too late in the session to make another effort for the bill. Before adjournment that evening, Brown, of Mississippi, a friend of the Cuba bill, moved to lay it on the table in order to secure a test vote upon it. The motion was lost, 18 to 30. The only difference between this vote and the one on the homestead

³⁶ *Globe*, 2d sess. 35th Cong., 727.

³⁷ *Ibid.*, 1351.

³⁸ *Ibid.*, 1352.

³⁹ *Ibid.*, 1354.

⁴⁰ Seward said: "The homestead bill is a question of homes, of homes for the landless freemen of the United States. The Cuba bill is a question of slaves for the slaveholders of the United States." *Ibid.*, 1353.

⁴¹ The vote was 19 to 29.

⁴² One vote from Rhode Island, New Jersey, Pennsylvania, Delaware, Ohio, Indiana, Oregon, and California, and two votes from Minnesota, *Ibid.*, 1362.

bill was that Johnson voted against the motion, two senators who had voted before were now paired, and there were two new votes, one from Maryland for and one from Oregon against the motion.⁴³

With its usual promptness the House passed a homestead bill at the next Congress.⁴⁴ The vote was 115 to 65. From Pennsylvania and Delaware came the only free state votes against it, while Missouri was the only slave state in which a representative favored the bill. The affirmative vote was cast by 90 Republicans and 25 Democrats while 48 Democrats and 17 Americans made up the negative.⁴⁵ The bill differed in one important particular from the previous ones. Under it the settler could enter 160 acres of land held at \$1.25 an acre or 80 acres at \$2.50, thus partially opening up the reserved railroad lands.⁴⁶

Andrew Johnson had introduced a homestead bill in the Senate which was under consideration when the other bill was received from the House. The essential difference between the bills as regards railroad lands was that one hundred and sixty acres of the reserved lands could be entered under the Senate bill and only eighty acres under the House bill. There was considerable discussion, however, over which of the bills should be acted upon, but the point in regard to the railroad lands was not mentioned. During the discussion Pugh cited the Southern Pacific bill, then before Congress, as an example of a donation of public land supported by the South. Wigfall, of Texas, claimed that a grant to the Southern Pacific could be made under the power given the government to transport the mails and to provide for an army and navy. He further argued that the railroad would increase the value of the remaining public lands while under the homestead bill only the poorer lands would be left to the government.⁴⁷

On April 17, Johnson reported from the committee on Pub-

⁴³ *Ibid.*, 1363. See Rhodes, *History of the United States*, II, 352-54.

⁴⁴ On March 12.

⁴⁵ *Globe*, 1st sess. 30th Cong., 1115.

⁴⁶ Donaldson, *Public Domain*, 336.

⁴⁷ *Globe*, 1st sess. 30th Cong., 1528.

lic Lands a substitute for both the bills. This provided for the right of pre-emption by an actual settler at twenty-five cents an acre.⁴⁸ Wade moved to substitute the House bill for the committee's bill, but the motion was lost.⁴⁹ Again we find the free and slave states arrayed against each other. The two far western states, California and Oregon, voted against the motion, however, as did Delaware, while Pennsylvania was divided.⁵⁰ The bill was then passed by a decisive majority.⁵¹

The House insisted on its original bill for some time, but as the Senate remained firm the House yielded for this Congress, in hope of obtaining something more at the next. In reporting the result of the conference to the House, Colfax stated that it was the best that could be secured. He said he wished that the bill opened up the railroad lands to settlement, but it was impossible to obtain this concession.⁵²

President Buchanan returned the bill to the Senate without approval.⁵³ He considered the price charged by the bill as merely nominal. Regarding the bill as conferring a gift of the lands, he claimed that Congress had no such power over the public domain. Congress as the trustee of the lands could "dispose of" the lands only in the limited sense required by the act of those creating the trust—the States. Nor did he consider it just to the former settlers because they would have paid the higher price for their lands. It was also unjust to the holders of land warrants, by reducing the value of the lands to which they could be applied. He considered the law wrong also in its discrimination in favor of the agricultural class and in its offer of inducements to emigration from the old states. The message closed with a plea for the continuance of the system of holding the lands for revenue, which in his opinion, ought to amount to

⁴⁸ *Ibid.*, 1751.

⁴⁹ 26 to 31.

⁵⁰ *Ibid.*, 1999.

⁵¹ The vote stood 44 to 8. Those voting against the bill were Bragg (N. C.), Clingman (N. C.), Hamlin (Me.), Hunter (Va.), Mason (Va.), Pearce (Md.), Powell (Ky.), and Thomas (Ga.). *Ibid.*, 2043.

⁵² *Ibid.*, 3179.

⁵³ June 22.

\$10,000,000 annually.⁵⁴ After some discussion the vote on the passage of the bill over the veto stood 27 to 18, not the necessary two-thirds.⁵⁵

In the thirty-seventh Congress matters were very radically changed. The chief opponents of the homestead policy were no longer sitting in that body, and when the homestead bill came up for passage in the House only 16 votes were cast against it.⁵⁶ The bill was very similar to the one which had passed the House at the previous Congress, providing for the entry of 160 acres of land at \$1.25 an acre, or 80 acres at \$2.50 an acre. Soon after the bill passed the Senate, the vote being 33 to 7,⁵⁷ and became a law, May 20, 1862.

At this time railroad land grants again came to the front, the first bill for a Pacific railroad being passed in this year, when the mass of the southern representatives had disappeared from Congress, under the pressure of the military importance of the road to the Pacific coast. Grants were also made to Michigan, Iowa, and Colorado. The next year in the grant to Kansas an important change was made. This was the extension of the grant from six to ten miles on each side of the road and of the indemnity limits from fifteen to twenty miles. This was done because the lands along the line had been so largely taken up that the increased grant was in fact no larger than previous ones.⁵⁸ But having been done once in a particular case it was continued as a matter of practice in others.

New grants continued to be made to the states with little consideration, but the most important bills were those renewing previous state grants and those making grants to corporations. The crisis of 1857 and the war had prevented the construction

⁵⁴ Richardson, *Messages and Papers*, V, 608-14.

⁵⁵ *Globe*, 1st sess. 36th Cong., 3272.

⁵⁶ These votes were from Rhode Island (1), Pennsylvania (1), New York (2), Virginia (2), Tennessee (1), Kentucky (7), Missouri (1), and Oregon (1). *Globe*, 2d sess. 37th Cong., 1035.

⁵⁷ The negative votes were from Delaware (2), Virginia (2), Kentucky (2), and Oregon (1). *Ibid.*, 1951. The fact that Oregon had had a special homestead act may explain the opposition of that state to a more general law.

⁵⁸ *Globe*, 3d sess. 37th Cong., 1158.

of many of the land grant roads and these grounds were urged for a renewal.⁵⁹ The same extension of the grants to ten and twenty miles was made as in the other acts, on the same plea of the taking up of the lands.⁶⁰ The interest taken in the bills may be seen in a remark of Senator Morrill, who said that he did "not know that anybody takes any interest in them except as a matter of locality."⁶¹

⁵⁹ "The financial trouble of 1857, and then the war coming on, prevented the construction of many roads." Speech of Hendricks in House, May 25, 1866. *Globe*, 1st sess. 39th Cong., 2820.

⁶⁰ *Globe*, 1st sess. 38th Cong., 1034.

⁶¹ *Ibid.*, 1744.

CHAPTER V.

THE PACIFIC RAILROADS.

Projects for a railway from the valley of the Mississippi to the Pacific coast followed not long after the exploration of the vast tract of land purchased from France in 1803. The western and northern limits of that purchase were long in dispute, but this seems to have furnished a stronger motive for hastening its settlement.

The first public advocate of such a road seems to have been one Hartwell Carter, who, in 1832, presented his plan in the *New York Courier and Inquirer*. He proposed to build a road from Lake Michigan to the mouth of the Columbia and to San Francisco, on condition that he should receive a strip of land for the whole distance and the privilege of buying 8,000,000 acres of public lands at \$1.25 an acre, to be paid for in the stock of the company.¹ During the early forties, John Plumbe presented a plan to Congress for the building of a transcontinental road. This included a grant of alternate sections of land on each side of the road, a plan similar to the other grants which were being urged at this time.²

The most prominent of all the advocates of a Pacific railroad was Asa Whitney. His first plan, as set forth in a memorial to Congress in 1845, involved a grant to him of a strip of land 60 miles wide, extending from Lake Michigan to the Pacific. On this he would build a railroad, selling the land as needed, and retaining for his own use that which might remain after the completion of the railroad.³ The next year he repeated his request,

¹ Bancroft, *California*, VII, 498-9.

² *Ibid.*, 500.

³ *Reports of Committees*, 1st sess. 31st Cong., No. 140, p. 23.

accompanied by an account of his exploration of the proposed route during the previous summer.⁴ In 1848 he presented a modified plan by which he was to be allowed the lands along the line at 16 cents an acre, which he was to receive in alternate five mile sections as each ten miles of the road were finished.⁵ In 1850 Whitney secured a favorable report from the House Committee on Roads and Canals. This advocated his plan as the most practicable one that had been advanced, gave preference to the northern route, and based the constitutionality of the land grant on the ground that it was not an appropriation of the public lands or their proceeds, but an acceptance of an offer to buy lands otherwise unsalable.⁶ The bill accompanying the report authorized Whitney to construct a road from Lake Michigan to the Pacific. The lands for thirty miles on each side of the road were to be sold to Whitney for ten cents an acre. Deficiencies in lands along the road were to be made up from such lands as he might select.⁷

The opposition to Whitney's plan came largely from the advocates of a "National" road, that is, one built by the general government. In 1849 Benton advocated a bill setting aside seventy-five per cent. of the money received from the public lands in California and Oregon, and fifty per cent. in the other states and territories, for the construction of a road from St. Louis to San Francisco, and a branch to the Columbia. A strip of land one mile in width was to be set aside for the road.⁸ The advocates of a "National" road opposed Whitney's plan on the grounds that it was too great for private management, that individuals could not treat with the Indian tribes, and that the government should not assist in a "stockjobbing" enterprise.⁹ On the other hand Whitney also cited the magnitude of the work as an objection to gov-

⁴ *Ibid.*, p. 27.

⁵ *Ibid.*, p. 36.

⁶ *Ibid.*, pp. 1-19.

⁷ *Ibid.*, p. 43.

⁸ *Globe*, 2d sess. 30th Cong., 473-4.

⁹ See speech of Benton, *Ibid.*, 472.

ernment control and claimed that there was danger of party domination and clash of sectional interests in the "National" plan.¹⁰

Neither Whitney's nor the "National" plan received much attention from Congress. The matter of a Pacific road was not so simple in 1850 as it had been in 1845. When Whitney first brought forward his plan, our Pacific coast did not extend south of latitude 42°. Only Puget Sound and the mouth of the Columbia, both necessitating a northern route, were available as western termini of a Pacific railroad. But in 1848 California was added to our territory, San Francisco and Monterey entered the field as candidates for the terminus of the road, and a southern route became a possibility. The natural economic rivalry between the two sections was increased by the question of slavery and the repeal of the Missouri Compromise. It is small wonder, to one familiar with the history of the country from 1850 to 1860, that a project which meant so much for or against the prosperity of one section or another failed to receive the assent of Congress.

From 1850 on, the question of a Pacific railroad was one of route, not of constitutionality. The northern route, from the Great Lakes to the Columbia, received also the support of the East. The central route, from Memphis or St. Louis via the South Pass to San Francisco, had many supporters among the central and southern states. The southern route ran from Texas via the valley of the Gila.¹¹

In 1853 the projects came most prominently before Congress. Rusk, of Texas, had introduced a bill for a road on the southern route with branches northeast and northwest. Alternate sections for forty miles on each side of the road were granted to aid in its construction. As the road was only within the territories, grants were made to Iowa, Missouri, Louisiana, Arkansas, and California for extensions through those states.¹² Gwin, of California, in-

¹⁰ Bancroft, *California*, VII, 507-8; citing Whitney, *A Project for a Railroad to the Pacific*.

¹¹ See Davis, *Union Pacific Railway*, Chicago, 1894, 38-42.

¹² *Globe*, 2d sess. 32d Cong., 280.

roduced a bill for a line from San Francisco to Memphis, via Fulton, with branches to Dubuque, St. Louis, Matagorda, New Orleans, and Fort Nisqually. The odd numbered sections for forty miles on each side of the road in the territories and California, and for twenty miles in the other states, were to be granted.¹³

The latter bill was an attempt to satisfy and harmonize all the conflicting and sectional interests. Rusk's bill had been referred to a select committee which reported a bill which attempted to solve the matter by leaving the selection of the route to the president, and providing for a grant of alternate sections for six miles on each side of the road in the states, and for twelve miles in the territories, together with \$20,000,000 in bonds.¹⁴ The bill reported by the committee was discussed at some length but no action was taken. The land grant feature of the bill attracted little attention, being overshadowed by the question of location and by the question of the power of Congress to create a corporation. In 1855 a bill providing for roads on all three routes and making a grant of lands of alternate sections for twelve miles on each side of the lines passed the Senate by a vote of 24 to 21.¹⁵ There was little discussion of the land grant. Indeed, the power to grant lands in aid of the Pacific roads seems to have been assumed even by the opponents of grants to the states. Niles, the persistent enemy of the state grants, was an advocate of Whitney's plan.¹⁶ In the House a bill providing for a Pacific railroad was passed but the vote was immediately reconsidered. Nothing was done with the Senate bill.¹⁷

Sectional differences increased as the war drew near, yet there

¹³ *Ibid.*, 281.

¹⁴ *Ibid.*, 469-70.

¹⁵ *Globe*, 2d sess. 33d Cong., 814.

¹⁶ June 27, 1848, he introduced a bill granting lands to Whitney for a railroad to the Pacific (*Globe*, 1st sess. 30th Cong., 875). July 29 he endeavored to secure the consideration of his bill (*Ibid.*, 1011), and on August 8 he moved it as an amendment to a land-grant bill (*Ibid.*, 1051). On January 29, 1849, he again moved to take up his bill (*Globe*, 2d sess. 30th Cong., 381). Davis, p. 32, says that the article in *Hunt's Merchants' Magazine* for July, 1849, on Whitney's plan was by Niles. I have found nothing to confirm this statement.

¹⁷ Davis, *Union Pacific Railway*, 64-65.

is a possibility that even if there had been no secession of the southern states a Pacific railroad bill might have been passed. In 1861 a bill for roads on the central and southern routes, passed the House. The Senate added a road on the northern route, together with various other amendments, and there was not time for the House to act on the amended bill.¹⁸

At the next session of Congress the law for the Union Pacific railroad was enacted. The only contest was between the St. Louis and Chicago interests.¹⁹ The act granted the company created by it five alternate sections on each side of the road, with indemnity limits of ten miles.²⁰

The inducements of this act were not, however, sufficient to persuade capitalists to invest in the enterprise.²¹ The next Congress received appeals for further aid, and a bill was passed increasing the bonds and raising the grant of land from five to ten sections a mile.²² The increase in the grant was made without discussion, the only argument being over the other features of the bill.

Opposition to land grants had by this time almost vanished, and at this session of Congress grants were made to the Northern Pacific and to various connecting lines of the Union Pacific. In 1866 grants were made to the Southern Pacific and to the Atlantic and Pacific. The year 1871 saw the last of the land grants, that provided by the Texas and Pacific bill.

The Pacific railroad proposition was thus advanced as early as the plans to aid the railroad in the states by means of the public lands. That it was so long in securing the assent of Congress was due to the sectional differences which arose as soon as the road on

¹⁸ *Ibid.*, 94-95. Gwin (*Memoirs, MS.*) says that action was deferred so that the new administration might have the credit for the measure. Bancroft, *California*, VII, 527.

¹⁹ Davis, *Union Pacific Railroad*, 98-103.

²⁰ "That there be, and is hereby, granted . . . every alternate section of public land, designated by odd numbers, to the amount of five alternate sections per mile on each side of said road, on the line thereof, and within the limits of ten miles on each side of said road." *Statutes at Large*, XII, 492.

²¹ Davis, *Union Pacific Railroad*, 110-115.

²² *Statutes at Large*, XIII, 358.

one or the other of the possible routes was proposed. The constitutionality of the measure was not questioned to any great extent, and the political necessity of a road on some route was generally admitted. Then, too, the enterprise could be carried out within the territories, and no question of interference with the rights of a sovereign state could arise. In consequence of the restriction of the road to the territories the grant had either to be made to a corporation or the work done directly by the government. The latter plan was never seriously considered, so the essential difference between the Pacific and the other grants was the person to whom they were made. Where the Pacific road was to be extended beyond the territories the states were to receive the grants. This distinction did not, however, hold in the case of later grants as the relaxation of the states' rights doctrine caused Congress to make grants to the corporations even where the roads ran through the states.

Numerically, the Pacific grants were the most important, as they covered a greater area than the grants made by the states. Yet their political importance has not been as great. At the time the grants were made Congress did not bestow the attention upon them it did upon the state grants, nor did they have as great an effect upon the land policy of the government. Since the roads were provided for they have been of importance in the politics of the country, but in connection with the bonds issued in favor of the companies rather than in regard to the lands granted them. The effect of the grants and the methods by which the roads administered them were, of course, very marked in the states and territories where the lands were located. This part of the question has been reserved for a later discussion.

CHAPTER VI.

THE REPEAL OF THE LAND GRANTS.

Even before the grants to railroads ceased, a movement was started to revoke some of the grants already made. At first this movement was not based on objections to the system but on the cases of individual roads where it was alleged that the conditions of the granting acts had not been fulfilled.

Many grants had been made during 1856. The crisis of the following year and the war were effectual checks to railroad building even in the northern states. In the South it was at a standstill. This involved non-compliance with the conditions of the grants, and an effort was made to secure their forfeiture. A bill forfeiting the grants to the southern states was introduced during the second session of the fortieth Congress. Not only was it urged that the roads had not been constructed but that the states had been disloyal, and so merited the forfeiture as a punishment. The argument was an effective one in the House and the bill passed 83 to 75,¹ but was not acted on in the Senate. At the previous session of Congress a committee had been appointed to investigate the southern railroads and report on their use during the war and on the forfeiture of the grants. A report was made December 11, 1867, but the forfeiture of the grants was not considered in it.² A report on this matter had been called for by a resolution of July 12, 1867,³ and on February 7, 1868, the committee reported itself unable to arrive at any conclusion on the subject. This seems to have ended the matter.⁴ A constitutional amendment prohibiting the disposal of the public

¹ *Globe*, 2d sess. 40th Cong., 310, 985.

² *Reports of Committees*, 2d sess. 40th Cong., No. 3.

³ *House Journal*, 1st sess. 40th Cong., 192.

⁴ *Reports of Committees*, 2nd. sess. 40th. Cong., No. 15.

lands to any but actual settlers was introduced, but a resolution to suspend the rules on its passage failed. Similar resolutions were introduced the next year but were not considered.⁵

On the other hand requests were still received from the states for grants in aid of railroads.⁶ The weight of opinion, however, seemed to be in favor of a discontinuance of the grants.⁷

The opposition of land grants was of a two-fold nature. Many who did not believe that any new grants should be made admitted that the former ones were justified but that the changed conditions of the country had removed the necessity for a continuance of the system. The population of the western states had increased until any aid which ought to be furnished new railroads could come from the country through which they passed. And, in fact, the new states were well provided with railroads and further building needed to be discouraged rather than aided. The result of these conditions was that practically no effort was made to secure new grants of lands. But not only had a change occurred in the conditions of the country, rendering land grants out of place, but the theory of the use of the public lands had also completely changed. The dominant idea was now that of the homestead law. As a source of revenue the public lands had failed, nor was it felt that such was their mission. The lands were to be used for the benefit of the settlers and nothing should be allowed to interfere with that use. Such was the general feeling in the country after the war. Out of this grew the demand

⁵ Ames, *Proposed Amendments of the Constitution, Report of the American Historical Association*, 1896, II, 182.

⁶ Alabama (*House Misc. Docs.*, 2d sess. 42d Cong., Nos. 54, 89, 90, 91); Wisconsin (*Ibid.*, No. 125); Oregon, (*House Misc. Docs.*, 3d sess. 42d Cong., No. 27); Idaho (*Ibid.*, No. 28).

⁷ G. W. Julian, in the *International Review* for February-March, 1883, speaking of the opposition to land grants, says: "This found expression in the press, in numerous gatherings of the people throughout the Northern and Western states, in the platforms of both the great political parties, in the resolves of state legislatures, and in the second annual message of President Grant, in which he condemned the policy of any further grants of lands to railroads, and recommended the dedication of the public domain to actual settlement under the Homestead and Pre-emption laws." I have given the main indications of public sentiment of this period which I have found, and beyond these can find no further justification for the statements of Mr. Julian. I am inclined to think that, writing at a later date, he exaggerated the state of popular feeling on the subject.

for the repeal of the land grants where the conditions of the act had not been fully complied with.

As early as 1870, the grant to Louisiana in aid of the New Orleans, Opelousas, and Great Western was declared forfeited.⁸ It was, however, considered that the grants lapsed of their own accord on the non-fulfillment of the conditions. But in 1876 the supreme court decided that the lands granted reverted to the government only after action had been taken to assert the forfeiture.⁹ The same year a bill was passed forfeiting the unearned lands of the Leavenworth, Lawrence, and Galveston road. The only difference of opinion was on the disposition of the forfeited lands, which were finally made subject to entry under the homestead law only. In 1877 a bill was passed repealing the grant in aid of the Kansas and Neosho Valley company. It was stated that this was done at the request of the company on account of the hostility of settlers along the line.¹⁰

During the next six years various attempts were made to secure the forfeiture of other grants, but it was not until the session of 1883-84 that the movement was strong enough to secure much attention from Congress. At this session twenty-four bills were introduced in the House and five in the Senate forfeiting lands granted to railroads.

In the House the bills were sent to the committee on Public Lands which reported a bill forfeiting a number of the grants, all of them being in the southern states.¹¹ An attempt was made to except the Gulf and Ship Island but the bill was passed as reported.¹² In the Senate the bill was not taken up. The House also passed a bill forfeiting the unearned lands of the Atlantic and Pacific.¹³ There was little discussion on this and no division.

⁸ *Statutes at Large*, XVI, 277.

⁹ *Schulenberg v. Harriman*, 21 Wallace, 44. See pp. 80-81.

¹⁰ *Record*, 2d sess. 44th Cong., 1510.

¹¹ Gulf and Ship Island; Mobile and New Orleans; Tuscaloosa to the Mobile road; Elyton and Beard's Bluff; Memphis and Charleston; Iron Mountain and Southern in Arkansas; and New Orleans to the state line. *House Reports*, 1st sess 48th Cong., No. 8.

¹² *Record*, 1st sess. 48th Cong., 787.

¹³ *Ibid.*, 4888.

In the Senate the bill was discussed at some length by Morgan, of Alabama. He said that the committee on Public Lands had received very contradictory opinions in regard to the power of the government in the matter. To settle the question of the right to declare a forfeiture he proposed an amendment conferring jurisdiction on the circuit court for the western district of Missouri to try the title to the lands, with the right of appeal to the supreme court. This amendment was adopted, 31 to 11.¹⁴ He further claimed that by the passage of the act of 1871, which allowed a mortgage of lands held by the company, the government had waived its right of forfeiture.¹⁵

The bill, as amended, passed the Senate without division,¹⁶ and went over to the next session of the House. At that time the House refused to agree to the Senate amendment. Two committees of conference were appointed but both failed to agree.

The Senate did not, however, hold consistently to its position in favor of a judicial determination of the right and power of the government in the forfeiture of railroad lands, for an amendment offered by Morgan to the bill repealing the grant to the Oregon Central, proposing to settle the question in the same manner as by his previous amendment, was defeated, 15 to 28.¹⁷ The same amendment when offered to the Texas Pacific bill was rejected, 24 to 31.¹⁸

At the next session the bill forfeiting the unearned lands of the Atlantic and Pacific became a law, but the Senate and the House were unable to agree as to the extent of the forfeiture of the Northern Pacific lands. The bill as it passed the Senate provided for the forfeiture of the lands along portions of the road not then completed. The House amended the bill by providing for a forfeiture of all lands opposite to portions of the road not finished by July 4, 1879, the date fixed in the granting act for

¹⁴ *Ibid.*, 5941, 5964.

¹⁵ *Ibid.*, 5686.

¹⁶ *Ibid.*, 5966.

¹⁷ *Record*, 2nd sess. 48th Cong., 482.

¹⁸ *Ibid.*, 1895.

the completion of the whole road.¹⁹ The Senate refused to agree to this and conferences held during this and the next session were unavailing.

By 1888 the attempts to secure the forfeiture of separate grants were succeeded by attempts to forfeit all unearned grants. A bill introduced that year in the Senate provided for the forfeiture of all lands "opposite to and coterminous with the portions of any such railroad, not now completed and in operation."²⁰

This passed the Senate after considerable discussion as to the rights of individual roads. The ayes and nays were not taken on its passage.²¹ This bill would have forfeited lands along 1,049 miles of road.²² The House committee on Public Lands, to which the bill was referred, made three reports. The majority favored the forfeiture of the lands opposite all portions of the roads not completed within the time required.²³ A minority of three favored the Senate bill, and another minority of two wished to forfeit the entire grants in all cases where the conditions had not been strictly complied with. These three, which were probably all the possible plans of forfeiture, were thus presented to Congress. The most radical one was defeated in the House by a vote of 60 to 106. Those favoring this proposition came from all sections of the country and it is impossible to determine any particular reason for the vote standing as it did. The party division was, however, quite strongly marked, as only 9 Republicans favored the amendment.²⁴ The Senate proposition was then voted down 71 to 92. The chief opposition to this measure seemed to come from the western states. Only 13 Democrats favored it while only 23 Republicans voted against it.²⁵ The amendment bill passed the House, 179 to 8.²⁶ The Senate

¹⁹ *Record*, 1st sess. 40th Cong., 7613.

²⁰ *Record*, 1st sess. 50th Cong., 3033.

²¹ *Ibid.*, 3878.

²² *House Reports*, 1st sess. 50th Cong., No. 2476.

²³ This would have forfeited lands opposite 4,598 miles. *Ibid.*

²⁴ *Record*, 1st sess. 50th Cong., 5933.

²⁵ *Ibid.*, 5935.

²⁶ *Ibid.*, 5939.

refused to accept the House amendment and the matter went over to the next Congress.

These three plans of forfeiture may be considered both from the standpoint of equity and legality. On neither ground could exception be taken to the Senate proposition forfeiting lands opposite to the then uncompleted portions of the roads. The time for their completion had expired and Congress was in no wise bound to extend that time. But the forfeiture of all lands earned since the expiration of the time specified in the laws has a different aspect. It had been well understood, both by Congress and the roads, that the forfeiture did not work without Congressional action. The repeated failures of Congress to so act were therefore in effect an extension of the grants and Congress was estopped from going back and annulling its previous action. In ordinary cases negative action would not have the strength of positive, but where, as in the case of grants on condition subsequent, one party was regarded as agreeing to the acts of the other unless an express statement to the contrary was made, its negative action was equivalent to a sanction of the act. It is also improbable that such a law would have been upheld by the supreme court as they had stated in regard to the St. Joseph and Denver railroad that "so far as that portion of the road which was completed and accepted, is concerned, the contract of the Company was executed, and as to the lands patented, the transaction on the part of the government was closed, and the title of the Company perfected."²⁷ In the face of such language the legality of the act proposed by the House was very doubtful. As to the most extreme plan, that of complete forfeiture, its injustice was apparent. It was prompted probably more by a general feeling against the railroads than by abuses of the land grant system.

At the next Congress, the bill in almost the same form as before passed the Senate,²⁸ and was again referred to the House committee on Public Lands. This time the committee reported

²⁷ *Van Wyck v. Knevals*, 106 U. S., 360.

²⁸ *Record*, 1st sess. 51st Cong., 3971.

in favor of the Senate plan.²⁹ Stone, of Missouri, introduced an amendment directing the attorney general to bring suit to forfeit all lands not earned within the time required by law. This was rejected, 72 to 93.³⁰ Hohman introduced an amendment forfeiting lands along all portions of roads not completed within the time prescribed.³¹ He claimed that the lands forfeited by the Senate bill were insignificant, and while he did not believe that the Senate would accept his amendment, he wished to place the responsibility upon that body.³² His amendment was defeated by a vote of 60 to 79,³³ and another attempt to secure the same amendment was lost, 84 to 107.³⁴

The Senate disagreed to some of the minor amendments of the House but an agreement was reached and the bill became a law September 29, 1890.³⁵

As has already been indicated, the action taken by Congress was practically the only one open to it. Whatever may have been the feelings of the members of the House on the subject, they were wise in yielding to the Senate and securing the forfeiture of those lands concerning which no doubt existed. But if the proposition for a judicial determination of the matter could have been adopted, a much more satisfactory solution would have been reached. The extent to which the forfeiture ought to work would have been in the hands of the supreme court and the rights of the government and the railroads given an authoritative determination.

The House, having secured something from the Senate, attempted to go further and during the next Congress passed a bill forfeiting lands along all portions of roads not completed in time. This bill was passed, under suspension of the rules, by a two-thirds vote,³⁶ but was not considered in the Senate. At the

²⁹ *House Reports*, 1st sess. 51st Cong., No. 2215.

³⁰ *Record*, 1st sess. 51st Cong., 7013, 7387.

³¹ *Ibid.*, 7012.

³² *Ibid.*, App., 581.

³³ *Ibid.*, 7382.

³⁴ *Ibid.*, 7388.

³⁵ *Statutes at Large*, XXVI, 496.

³⁶ *Record*, 1st sess. 52nd Cong., 5121.

next Congress a similar bill was passed by the House.³⁷ The Senate committee reported it adversely, declaring that Congress had no right to make such a forfeiture.³⁸ Here the matter may be said to have ended.

Probably the only statement of the change in the attitude of Congress on land grants which can be made is that it was due to the opinion that land grants had had their place and that the time when such aid to western railroads was necessary had passed. Under the changed conditions of the country it was felt that the government should demand back the lands previously granted from the companies which had failed to take advantage of the opportunity offered them. Probably considerable feeling against the railroads existed in the far west but I have obtained no definite evidence of this.

The Democrats wished to go much further than the Republicans in the matter of forfeiture and emphasized this fact, and the large grants to the Pacific railroads made under Republican administrations, in their campaign text books. But at no time was the issue of importance in a national election.

³⁷ *Record*, 2d sess. 53d Cong., 7355.

³⁸ *Record*, 3d sess. 53d Cong., 386.

CHAPTER VII.

THE DISPOSAL OF THE GRANTS.

The history of a land grant requires more than an account of the passage of the bill making the grant. It involves also the process by which the lands passed into the possession of the states and the companies and were by them disposed of to the settlers. The question is thus an administrative one, and the machinery of the general land office for the adjustment of railroad grants must first be examined. Some attempt will then be made to show in a general way the process by which the state grants were bestowed upon the companies, what restrictions were placed on these companies, how they fulfilled the conditions of the grants and how they disposed of their lands.

The grant to Illinois of September 20, 1850, was taken as a model for nearly all the other grants to states. This gave the right of way through the public lands for 100 feet on each side of the road with the right to take necessary materials from the lands. In addition every alternate even-numbered section for six miles on each side of the road was granted the state. If any of the lands so granted had been disposed of, the deficiency should be made good from the next adjacent public lands not more than fifteen miles from the road. The line was to be commenced at its termini simultaneously and the lands were to become available as the road progressed. The lands remaining to the United states within six miles of the road were not to be sold for less than the double minimum (\$2.50). The line was to remain a public highway for the use of the government, and mail was to be transported for such price as Congress might direct. If the road was not completed within ten years the lands should revert to the gov-

ernment, and the state should pay the United States the amount received from the land already sold.¹ The same general features were retained in the grants to the other states. During the later period the grants were increased from six to ten miles and the indemnity limits from fifteen to twenty. The grants to the Pacific roads were also made on the same general basis, but directly to corporations. More stringent exceptions concerning the lands to which the grants applied, were also made, so that the lands within the ten mile limits were somewhat reduced.

After a grant had been made, a procedure was adopted which was probably the only just one to the railroads, under the circumstances, but which proved in the end to be probably the worst feature of the system. After a map showing the definite location of the road had been filed in the land office, the lands falling within the limits of the grant were withdrawn from sale or entry until the grant should be adjusted. The titles to the lands within the six mile limits were first ascertained, and when these had been adjusted the road made its indemnity selections, and the remaining lands were restored to market.² Thus it was necessary to withhold the lands within the indemnity limits until a complete adjustment had been made. If the adjustment had been prompt the plan would not have worked a hardship, but, as it was, the indemnity lands of nearly all the roads were kept out of the market for over thirty years.

The effect of this delay in the adjustment of the grants and the restoration of the remaining lands to market was a most unjust one on the settler. He was in theory prohibited from going on a strip of land thirty or forty miles wide and the length of the road to which the grant had been made. As a matter of fact, many did go on these lands, expecting to secure a perfect title later, and then the railroads would select these lands as due them for indemnity. There was, of course, a temptation for the railroads to make a selection of such lands inasmuch as the squatters would

¹ *Statutes at Large*, IX, 466.

² Commissioner of the General Land Office, *Report*, 1857; *Sen. Docs.*, 1st sess. 35th Cong., II, 88-89.

be forced to come to some agreement with the companies. The case of Guilford Miller attracted some considerable attention in connection with this feature of the land grant system. He had settled on lands afterwards claimed by the Northern Pacific as indemnity lands. The case came before the Attorney General, who decided that the withdrawal of the lands was legal and that Miller could acquire no title. President Cleveland thereupon took an interest in the case and directed the Interior Department to make the railroad selections in such manner as to protect the rights of settlers wherever possible.³

Soon after this case was decided, an effort was made to secure a final adjustment of the grants. In 1887 Congress passed a law directing the Interior Department to adjust the grants, and Secretary Lamar ordered the railroads to show cause why the withdrawals of their indemnity lands should not be revoked. In the case of most of the roads it was found that either they had selected all the lands to which they were entitled, or had selected all liable to such selection within the indemnity limits. The purpose of the withdrawal had therefore been served and the lands should have before been restored to entry.⁴ In a number of cases the department had not been informed to what extent the roads were entitled to lands within the indemnity limits. These roads were chiefly in the southwest and west, including the Northern Pacific west of Dakota and the Atlantic and Pacific west of Missouri.⁵

The answer of the Atlantic and Pacific to this order, and the decision of the secretary in regard to the land of this road (the decision was applied, *mutatis mutandis*, to the other roads), showed that the companies were not in many cases responsible for the delay in the selection; surveys of the public lands in the western states have been slow, and until they had been made in the land through which the railroad passed, it was impossible to tell to what land the company was entitled. Secretary Lamar, how-

³ Secretary of the Interior, *Report*, 1887, 9-10.

⁴ *Decisions of the Dept. of the Interior relating to the Public Lands*, VI, 80-81.

⁵ *Ibid.*, 82-83.

ever, held that the original withdrawal had not been contemplated by Congress but had been on executive authority only. He thought that the time had come when the best interests of all concerned required that the withdrawal for the benefit of the company should cease, claiming that the matter of survey was in the discretion of Congress. He therefore directed that all lands withdrawn for indemnity purposes be restored to the public domain, except in the case of a few companies when the withdrawal had been expressly authorized by Congress.⁶ The amount of land restored by this order was 21,323,600 acres.⁷

Many questions have arisen regarding the interpretation of the various land grant laws, the conflicts over lands claimed under them, and also their relation to the pre-emption, homestead, and other laws relating to the disposal of the public domain. The decisions of the courts on this subject are very numerous and a complete examination of them belongs to the legal field.⁸ Some of the more general principles may, however, be noted here.

While the relation between the government and the states or corporations receiving the land grants is a contractual one, yet as the contracts are a part of public rather than private law, the intent of Congress will govern in regulating their construction.⁹ In order that this intent may be correctly ascertained the condition of the country at the time the grants were made as well as the language of the law will be taken into consideration,¹⁰ but in general the grants will be strictly construed against the grantee.¹¹

The question of the exact time that the companies acquired title to lands was of great importance in relation to entries which might be made along the line under pre-emption and homestead laws. While, as has been noted, it was the practice to suspend the right to enter lands along the probable route of the road

⁶ *Ibid.*, 85-93.

⁷ Secretary of the Interior, *Report*, 1887, 12.

⁸ See Elliott, *Treatise on the Law of Railroads*, ch. 33; Rapalje and Mack, *Digest of Railway Decisions*, under "Land Grants."

⁹ *Mo., K. & T. R. Co. v. Kas. Pac. R. Co.*, 97 U. S., 491.

¹⁰ *Winona & St. P. R. Co. v. Barney*, 113 U. S., 618.

¹¹ *Dubuque & P. R. Co. v. Litchfield*, 23 Howard, 66; 57 Am. and Eng. Railroad Cases, 338.

until the definite location was made, yet no title passed until the road was so located.¹² But in case conflicting grants for two companies were made, the priority of the grant, rather than priority of location, gave the title to the lands.¹³ When grants of the same date conflicted, priority of location or construction gave no right to the lands within the conflicting primary limits of both roads, as these were divided, but in case of the conflicting indemnity limits priority of selection gave the title.¹⁴ Lands which had been entered under other laws were excepted from the grant, but such entries had to be made before the company located its road. Where lands within the grant had been previously entered under the homestead law and the conditions of that law were not complied with, the company did not obtain these lands but on their reversion to the public domain priority of selection gave title to the lands.¹⁵

By far the most important judicial decision concerning land grants was that of *Schulenberg v. Harriman*, rendered in 1876. In this case the court held that the words of the grant "there be, and is hereby granted," etc., signified an immediate transfer of title, although subsequent proceedings were required to give precision to that title and attach it to specific tracts of land. The grants were therefore made on condition subsequent and the provision that lands should revert to the United States in case the road was not completed within ten years, was only a provision that the grant would be void if a condition subsequent was not performed. In regard to the enforcement of this right the court say: "It is a settled law that no one can take advantage of the non-performance of a condition subsequent annexed to an estate in fee, but the grantor or his heirs, or the successor of the grantor, if the grant proceeds from an artificial person; and if they do not see fit to assert their right to enforce a forfeiture on that ground, the title remains unimpaired in the grantee."¹⁶

¹² *Hannibal & St. Jo. R. Co. v. Smith*, 9 Wallace, 95; 14 Am. & Eng. Railroad Cases, 503.

¹³ *St. P. & S. C. R. Co. v. W. & St. P. R. Co.*, 112 U. S., 720.

¹⁴ 16 Am and Eng. Railroad Cases, 430.

¹⁵ *Ibid.*

¹⁶ 21 Wallace, 44.

The effect of this decision was to make it necessary for Congress to take action, either in the form of a repeal of the grant or an authorization of the Attorney General to bring suit for a forfeiture of the lands. Until some action was taken, the companies could go on and complete their roads, receiving from the government the patents for the lands as fast as they earned them. Nor was it probable that the supreme court would have sustained laws forfeiting the lands thus earned after the expiration of the time for the building of the road. A decision which has already been noted,¹⁷ implies that the contract between the government and the companies was complete when the road was built and the lands patented, so that it would be impossible for the government to recede from its side of the contract at a later date.

One of the ideas in making the grants to states rather than to corporations was that the state would be able to exercise control over the grants, thus placing a check on the evil effects of corporations. But there is nothing to show that the states did any better in this than Congress would have done if the companies had received the grants direct, or than Congress did do when the grants were made to the Pacific roads. The contest in the Wisconsin legislature over the disposal of the land grant was, proportionately, more discreditable than the *Credit Mobilier*. Boards were in some states created to supervise the roads and the granting of lands to them, but these do not seem to have contributed to the improvement of the system. Another step which some of the states took was the requirement that a certain percentage of the earnings of the road be paid into the treasury as a condition of the grant. But as this was in lieu of other taxes the gain was questionable, especially as the earnings of the roads have become the usual basis of taxation. So the interposition of the states between the government and the roads cannot be regarded as having placed any additional safeguards around the grants.¹⁸

¹⁷ *Van Wyck v. Knevals*, 106 U. S., 306. *Supra*, p. 73.

¹⁸ In Appendix A an attempt has been made to trace the history of the grants after they passed into the hands of the states and corporations. All such questions will be considered at greater length there.

As far as the roads themselves were concerned the system was in many cases not carried out in the manner intended by Congress. A quick construction of the roads had been expected since the purpose of the grants was to enhance the value of the other public lands. A long delay in the building of the roads might entirely change the situation and remove the necessity for that particular road. But that Congress failed to act, after the need of such action to prevent the further earning of the grants had been pointed out, was not the fault of the roads, and the failure so to act was, in effect, a re-grant from year to year.

It is impossible to give an exact estimate of the amount of railroad mileage completed on time. In many cases the time for the building of the road was extended greatly over the original grant. In 1890 the House committee on Public Lands reported that of railroads aggregating 7,445 miles in length there had been built on time 2,847 miles and after the time required 3,541 miles, leaving in 1890, 1,056 miles unbuilt.¹⁹ This did not include the Atlantic and Pacific and various smaller roads, the grants to which had been repealed previously. Nor, on the other hand, did it include those roads which had been entirely built on time. The best estimate I can make is that about one-half of the railroad mileage to which the grants applied was built within the time required by the acts.

Donaldson²⁰ estimated that the total amount of land granted under various acts was 155,504,994 acres. Previous claims and forfeitures have taken up a large part of this, so that in 1897 there had been patented on behalf of these grants 87,915,326 acres, and it was estimated that 11,436,809 acres were necessary to complete them.²¹ Figures relating to the disposal of those lands by the companies are very incomplete. In general, the roads seem to have made no effort to build up a land monopoly, but to have disposed of their lands to settlers as rapidly as possible, and at reasonable prices. The attempt to bring settlers to

¹⁹ *House Reports*, 1st sess. 51st Cong., No. 1179.

²⁰ *Public Domain*, p. 273.

²¹ Commissioner of the General Land Office, *Report*, 1897, 234, 224.

these lands is a part of the general effort which the railroads have made, by advertisements, immigration agents, home-seekers excursions, etc., to increase the population along their lines.

In 1880 a report from the Auditor of Railroad Accounts concerning most of the roads to which lands have been granted showed that of 32,131,731 acres then patented to the roads, 14,310,204 acres had been sold.²² The time since the grants had been made was from twenty-eight to fourteen years. Considering the newness of the country, the sales seem to have been as rapid as could be expected. No evidence has been found of a disposition to retain the lands until high prices could be obtained for them. Every effort seems to have been to attract settlers and to sell the lands as soon as possible. The total amount received for the lands included in the above report was \$68,905,479. The highest average price per acre was in the case of the Chicago, Burlington, and Quincy which had received \$12.12. The lowest price was that of the lands of the Oregon and California, \$2.14 an acre. After 1880, higher prices were sometimes obtained, but the average price to date has been under rather than over \$10 an acre.

Few of the roads still hold large tracts of valuable lands, and the lands have not been the source of wealth to the roads that is commonly supposed. Even in the case of the largest grants the balance for the whole period is quite small and in many cases the land departments are now a source of expense rather than of revenue. The question, like all features of railway finance, is a complicated one. The lands may not have been well managed, sales may have been made to those interested in the road, or profits may have been concealed in an expense account. Any definite conclusion on this subject would require a complete examination of the finances of the companies, an examination impracticable in this connection and probably impossible in any case.

Comparing the building of the roads which received land

²² Donaldson, *Public Domain*, 779.

grants with those that did not, it seems that there was no particular need for most of the grants. Unaided roads were built along similar routes even faster than aided ones. The great transcontinental roads, however, probably needed the assistance of aid in the shape of land or bonds to secure their construction at the time they were built.

CHAPTER VIII.

CONCLUSION.

The development of the Mississippi valley in the period preceding 1850 has already been considered. It was the fact of this development, together with the existence of large tracts of public lands in this new country and the peculiar political conditions of the time, which led to the system of railroad land grants. As we have seen, it was useless to expect direct aid from the states or federal government. The attempts of the states to carry on works of internal improvement directly had been so disastrous that aid to private enterprises of that kind was virtually prohibited. On the other hand the prevalent political theory was that it was not within the province of the national government to extend such aid. With both of these sources of assistance cut off, the idea of indirect aid by means of the public lands was evolved.

It was not proposed that there should be a direct gift of the lands. That the public lands were to be held for profit was another doctrine of the time. If the proposition could be so presented that both the government and the railways would derive a direct financial gain, it would be taken out of the category of internal improvements—the spectre of every Democratic politician since Jackson's administration—and would become simply an advantageous means of raising revenue. By the use of the states as an intermediary, moreover, the respect for the state autonomy was preserved.

Having in mind the conditions of the time when the land grants were first discussed in Congress, we may review the history of the grants and the principles on which they were made.

We may distinguish four periods in the history of land grant legislation:

1. The first of these extended from about 1837 to 1850. This was the formative period, when the theories on which the grants were made, and the grounds of opposition to them, were becoming evident.
2. The second period extended from 1850 to 1857, and may be called the period of grants to states, together with the beginnings of the homestead law. During this period the movement for the Pacific railroad was also taking shape; it occupies much the same relation to that movement which the earlier period occupies toward the state grants.
3. In the third period from 1857 to 1872, the Pacific roads had their turn, and the grant to a corporation was the distinctive form of the time. Extensions were also made of earlier grants to states and a few new grants to the states were made.
4. The reaction set in, and from 1876 to 1890 efforts were made to secure the forfeiture of the unearned grants.

During the first period, the main argument for the land grants was that which represented the government as a private land owner wishing to secure the largest returns from his domains. Much of the government land was far from the settled portions of the country and would not sell unless the country was developed. If a portion of this land was donated to a railroad which would make the remaining land salable, was not the government acting as any wise individual would? To give greater force to this idea, it was proposed that the grant should be in alternate sections, with the price of the remaining lands doubled, so that the gain would be direct and in exact proportion to the amount granted. Extended to its logical conclusion, the argument amounted to this: lands can only be granted in an unsettled country, for if the country was settled the government would not need to create a market for its lands. That this was a good thing

to build railroads beyond the outposts of civilization, was one of the popular ideas of the time.¹ The framers of the above argument held that the lands should be used for the direct benefit of the treasury.

There were also those who considered that the better plan was to distribute the proceeds of the lands, or even the lands themselves, among the states. The distribution of the proceeds had been a Whig doctrine at the time of that party's greatest power. But there was now hardly enough money from the sale of lands to pay to distribute, so it was proposed to distribute the lands themselves. This was the idea of the bill which passed the House in 1852, which, as we have seen,² received its chief support from the Whigs. The fundamental doctrine of this bill was the same as that of the regular land grants: the land was the joint property of all the states, but the profits from the lands were to be realized in a different manner.

It has seemed to me that some such division as that proposed by Bennett,³ if it could have been final, would have solved the problem of land grants better than was done by the separate grants. The selection which Congress made of one road or another to receive the aid from the lands was not on any principle of national or state interest, but on political or personal grounds. The other plan would have placed the matter in the hands of the states who would probably have dealt as wisely with the matter as Congress did. At any rate as between the states some proportion would have been observed in the distribution of the grants.

Still another class of persons considered the new states entitled to the lands within their boundaries. At least it was urged that the state should be allowed to exercise a high attribute of sov-

¹ Von Holst says, speaking of the crisis of 1857: "Railroads had not only to precede artificial roads, but to wide circles of people it did not, by any means, seem an absurd idea to build them into the wilderness." *Constitutional History of the United States*, VI, 105. It may be noted, however, that Professor von Holst entirely neglects land grants and their effect on the period which he covers in his work.

²Supra, p. 42.

³Supra, pp. 41-42.

ereignty over these lands, the right of taxation. As such a right was not enjoyed by any of the states over the public lands within their limits, it was argued that the donation of a certain amount of land in lieu of the money which might otherwise have been secured, was only just and equitable.

During the first period those opposed to land grants held that the exercise of such a power was unconstitutional. This idea was connected with the opposition to internal improvements, for there were some who saw that the difference between grants of alternate sections of land and grants of money was not so great as many professed to believe. No particular constitutional provision was cited in behalf of their position, but the general unconstitutionality of national support for internal improvements was relied upon in support of their case. And if federal internal improvements were unconstitutional, then land grants should probably be considered so. On the other hand, the provision of the Constitution that "Congress shall have power to dispose of, and make all needful rules and regulations respecting the territory or other property belonging to the United States,"⁴ was cited as clearly giving the power to grant lands.

Such were the arguments pro and con during the first period of land grants. The second period may be called that of the homestead law. At this time the chief objection to the grants was made on behalf of the settlers: that the grants would raise the price of the best lands in the new states, not only the lands granted to the railroads which it was supposed would be sold at high prices, but also the lands reserved to the government, which were held at double the regular price. As it would, to a large extent, have destroyed the principle on which the grants were made to have left the price of the reserved lands at \$1.25 an acre, objections to the grants on that score were unavailing. The somewhat narrow ideas of the time on the question of transportation caused the belief that the fifteen mile limits of the grant formed the limits of the influence of the road so that the benefit to gov-

⁴Art. IV, sec. 3, paragraph 2.

ernment lands beyond those limits was considered as *nil*. It was believed that the only way to reimburse the government was to raise the price of the reserved lands, and the settler must pay the difference if he wished to be near a road.

The objection to the increase in price of the lands was part of a general feeling that the best way to dispose of the public lands was to grant them to actual settlers in consideration for improvements and cultivation. Beginning with a reduction in price to actual settlers the theory was soon enlarged to an actual donation. Many believed that the work of the settler on his land would be a full equivalent to the government for the price at which it was held. But a much broader view was that which considered the best basis of the nation its agricultural population, and that the best use which could be made of the public lands was to encourage the development of a rural class. The correctness of this view has, I think, been attested by the working of the law, and by the fact that the good results have never been seriously questioned.

That the homestead law was a party question is clearly shown by the analysis of the votes given in the previous pages. It was first brought forward prominently by the Free-Soil party and passed with the other doctrines of that party to the Republican party on its organization. The Democrats largely opposed the measure because of their ideas on the construction of the Constitution, as they did not believe that it was one of the functions of government to assist the needy or landless by donations of the public lands.

The economic principle of *laissez faire*, which had been since the time of Adam Smith the dominant doctrine in economics and political science, was frequently invoked by the Democrats both on the tariff and homestead questions. It was said: You proposed the tariff because there was too much agriculture and too little manufacturing in the United States, and now you propose the homestead law because there are too many people engaged in manufacturing in the cities and too few in agriculture on the western lands—you should have left matters alone at first. But

the thing which most of all made the homestead law a political question was its connection with slavery. For it was very true that the North alone would receive the benefit of the law. The struggle for Kansas had shown that the South did not have the men to settle even one territory,⁵ and if the additional inducement of free land was added, the struggle would have been even more hopeless. In the intensity of the struggle over slavery just preceding the war, the least weight which would influence the balance was fought with intense energy by the slaveholders. A measure of such importance to the North as the homestead law stood no chance of receiving the votes of the South.

The opposition between homesteads and land grants has already been indicated. How far this extended is not clear. Only at one time, during the thirty-second Congress, did the two measures appear before the national legislature at the same time. At that time we noted an equal three-fold division of the members of Congress, those favoring both systems, those opposed to both plans, and those in favor of one and opposed to the other. Some members argued that the systems conflicted and others that they did not. The nearest approach to a solution seems to be that there was opposition between the plans, but that this opposition was not entire and did not extend to all features of the questions or to all members of Congress.

The third period, that of the Pacific grants, has not the interest which the previous ones had, although the grants to the Pacific roads form a quite distinct part of the land grant system. The principle on which they were made was frankly that of aid to a certain work of internal improvements, but it was justified by the extent and national importance of the undertaking and by the constitutional power of the government to establish post-offices and post roads and to carry on war. The great obstacle to

⁵ "The lesson of the vain struggle for Kansas showed that they lacked the human material—slaves as well as freemen—successfully to stand the struggle of competition with the north in the making of settlements. A homestead law would necessarily accelerate the growth of the preponderance of the free states much more than a railway running north of Mason and Dixon's line to the Pacific ocean." Von Holst, *Constitutional History of the United States*, VI, 302.

the building of the Pacific road was not constitutional but sectional. That portion of the territory through which the road was built was expected to show a great increase in wealth and population. Whether the territory so benefited was to be slave or free was a vital point in the opinion of every person. The first Pacific grant, although passed after secession, was on the middle rather than the northern route; but it also tended to strengthen the power of the North as it ran through free states.

The last period was distinctly anti-land grant; the failure of many of the companies to build the roads within the time required by the granting acts and the various abuses which had entered into the system soon caused a demand to be made for the forfeiture of a number of grants. At first this was confined to individual roads, but later the more comprehensive plan of forfeiting all unearned grants was presented. This forfeiture could be made in three different ways. First, the entire grant could be forfeited where the provisions of the granting act had not been fully complied with. Second, the lands opposite the parts of the road which had not been built on time could be forfeited. Third, the lands opposite the part uncompleted at the time of the passage of the forfeiture act could be restored to the public domain.

The first proposition secured the favor of a considerable number of representatives, but failed to pass the House. In the Senate it was never offered. The second plan was that demanded by the House, at first by the passage of a bill to that effect, and then in a reluctant assent to the more moderate plan of the Senate followed by another bill embodying their ideas on the subject. The last plan was that which the Senate always advocated and which was expressed in the legislation of 1890.

It is doubtful whether any but the last plan would have been held valid by the supreme court. The matter never came directly before that body for its determination, but the language used in land grant opinions would indicate that the legality of any more complete forfeiture was doubtful. This seems to be as true in equity as in law. The time for Congressional action was

when the grants expired. Then the lands could have been forfeited without particular hardship. But as Congress not only neglected but refused to act in the matter, the roads could assume, especially in view of the decision in *Schulenberg v. Harriman*, that construction gave them an equitable title to the lands thus earned. Action should have been taken much earlier in regard to many of the roads, but having failed to take such action Congress could not undo its work at some future date without regard to what had happened in the meantime. On the question of forfeiture, the Democrats took a much more advanced position than the Republicans, but there is no evidence that the question was ever a live one in national politics.

The land policy of the government in regard to its arable public lands was practically settled by 1863. It was that of grants for railroads, education, and settlement. After the war the correctness of this policy was not seriously questioned, and the public land question ceased to occupy an important place in national politics. There was, indeed, considerable discussion over the forfeiture of certain railroad grants, but this question occupied a very minor position in the politics of the time and was unconnected with other political issues. On the other hand, the homestead policy was considered as the only possible manner in which the lands should be given to settlers. The lands thus ceased to be a source of revenue and so had no effect on finance and the tariff, while slavery and state sovereignty had ceased to be questions of the day. The problems arising in connection with the adjustment of the old principles of land legislation to the conditions of the forest areas and arid tracts of the west of to-day, constitute a new chapter in the agrarian history of the country. Irrigation areas now attract attention in place of railroad routes. But disposition of the public domain is still a living question.

APPENDIX A.

THE USE OF RAILROAD LANDS BY STATES AND CORPORATIONS.

The following summary of the disposition of the land grants to railroads must be regarded as provisional. The material is too scattered, insufficient, and sometimes unreliable, to permit exhaustive treatment or very positive detailed conclusions. But the following data have been laboriously collected and, although incomplete, are presented partly in the hope of stimulating students in the respective states to give fuller investigation to the subject.

ILLINOIS.

The act of September 20, 1850, granted lands to Illinois for a road from Chicago to Cairo, with a branch to Dubuque via Galena.¹ The western part of this line had been part of the internal improvement scheme of 1837,² but like the rest of the plan had never been carried out.

Even before the internal improvement plan had been adopted a company had been chartered to build the road. When the state undertook the work, this company was compelled to surrender its charter; but in 1843 the charter was returned, only to be repealed in 1845 and again revived in 1849.³ By this last act the governor was to hold in trust for the company any lands which might be granted to the state for the benefit of the road.⁴ There seems to have been considerable opposition to this company and to the "Holbrook charters," as the laws relating to it were called. Douglas was particularly persistent in his work against the company and finally secured from the company a release from all its rights to the lands which might be granted to the state. Douglas regarded this release as necessary in order to secure

¹ "From the southern terminus of the Illinois and Michigan canal to a point at or near the junction of the Ohio and Mississippi rivers with a branch of the same to Chicago, on Lake Michigan, and another via the town of Galena in said state to Dubuque in the state of Iowa." *Statutes at Large*, ix, 466.

² Moses, *Illinois, Historical and Statistical*, Chicago, 1889, I, 409-413.

³ Davidson and Stuvé, *History of Illinois*, Springfield, 1874, 573-74.

⁴ *Private Laws of Illinois*, 1st sess. 16th Assembly, 90.

the passage of the bill,⁸ but it is not clear how widespread the feeling against the company was or what were the grounds for it. At any rate the old company was not inclined to give up its claim to the lands and a struggle in the legislature ensued. The grant was at last conferred upon a company organized by eastern capitalists.⁹

The act incorporating the new company provided for trustees to supervise the disposal of the lands, which were to be sold as fifty-mile sections of the road were completed. The main line was to be built within six years. The lands of the road were to be exempt from taxation and in lieu of this five per cent. of the gross income of the road each year was to be paid into the state treasury. The other assets of the company were to be exempt from taxation for six years, and after that any excess over three-quarters of one per cent. on the taxation of these assets was to be deducted from the five per cent. income tax.⁷ The company seems to have been willing to agree to as high as ten per cent. tax,⁸ but this was not necessary. In 1870 an amendment to the Illinois Constitution was adopted by a vote of 147,032 to 21,310, prohibiting any modification of this law.⁹

The new company was organized in March, 1851, and the construction of the road begun during the summer of 1852. In September, 1855, the whole road was opened for traffic.¹⁰ The entire length of the road was 705.5 miles, which would have given the company, if all the lands had been unoccupied, 2,709,100 acres. Of this amount the company has received 2,595,053 acres.¹¹

It was decided by the directors to divide the lands into the following classes: For construction, 2,000,000 acres; for interest on bonds, 250,000 acres; free lands, 345,000 acres. The price was fixed in 1856 at from \$5 to \$25 an acre, to be sold on six-year credit, with interest at three per cent. The deed was not given until the entire price was paid, and so the exemption from taxation was secured to the purchaser for six years. It was required that the lands should be put under cultivation.¹² The actual average price received for the lands up to 1872 was \$10.09 an acre.¹³ After that the price decreased, until in 1883 it had reached \$4.30. Since then it has increased and was \$7.59 in 1895.¹⁴

⁸ Douglas to Breese, Feb. 22, 1851, *Springfield Daily Register*, March 13, 1851; *Fergus Historical Series*, No. 23, 96-7.

⁹ Davidson and Stuvé, *History of Illinois*, 576-81.

⁷ *Private Laws of Illinois*, 1st sess. 16th assembly, 61.

⁸ Ronham, *Fifty Years' Recollections*, Peoria, 1883, 460.

⁹ Donaldson, *Public Domain*, 265.

¹⁰ Poor, *Railway Manual*, 1879, 730-40.

¹¹ Commissioner of the General Land Office, *Report*, 1897, 225.

¹² *Circular Concerning the Illinois Central Lands*, New York, 1856.

¹³ Poor, *Railway Manual*, 1872-73, 540.

¹⁴ Poor, *Railway Manuals*.

It was stated in Congress that the plan of the company was to hold its lands until the increase of population had raised their value, and during the interim the money for the road was to be secured by means of bonds.¹⁵ No such intention is evident in the action of the company, for the lands were freely offered at the price above mentioned and their sale was quite rapid. Up to and including 1855, lands to the amount of 528,863 acres had been sold.¹⁶ This was for only seventeen months, as the lands were not put on the market until August, 1854. By 1861 the sales had amounted to 1,200,000 acres;¹⁷ by 1872 the company had disposed of 2,215,789 acres,¹⁸ and in 1895 only 87,373 acres remained.¹⁹

The largest sales up to 1865 had been in the central portion of the state, from Centralia north to La Salle and Kankakee. In the south the sales were very light, while in the northern portion of the state the company received few lands.²⁰ In 1873 the lands remaining in the hands of the company were nearly all south of Centralia.²¹ There had been received from the lands sold up to 1872 something over twenty-three million dollars.²² From 1872 to 1880 complete figures are not obtainable; from 1880 to 1890, \$936,923 were received.²³

The building of the road accomplished the avowed purpose for which the grant was made: the sale of the public lands. As early as 1852 the land commissioner considered that the sale of lands had demonstrated the success of the bill,²⁴ and by 1855 it was reported that all of the government lands were sold.²⁵

MICHIGAN.

The first grant to Michigan was that of June 3, 1856, by which several railroads were provided for.²⁶ The legislature of Michigan accepted the

¹⁵ *Globe*, 1st sess. 32d Cong., App., 808.

¹⁶ Gerhard, *Illinois as It Is*, 407.

¹⁷ *Circular in regard to the Illinois Central lands*, Chicago, 1861.

¹⁸ Poor, *Railway Manual*, 1872-73, 540.

¹⁹ *Ibid.*, 1896, 565.

²⁰ *Map of Illinois Central Lands*, Chicago, 1865.

²¹ Vernon, *American Railroad Manual*, 1874, 530.

²² Poor, *Railway Manual*, 1872-73, 540.

²³ Poor, *Railway Manuals*.

²⁴ "The grant to the Mobile and Chicago railroad, made by the act of 20th September, 1850, so far as the state of Illinois is concerned, where the selections have been completed and the lands retained by the government brought into market, is strongly in point in support of this view. Here the greatest anxiety was manifested to obtain lands along the road, even at the enhanced minimum, and thousands of acres were disposed of that would probably have remained unsold for many years." Commissioner of the General Land Office, *Report*, 1852, 78.

²⁵ *Bankers' Magazine*, ix, 815.

²⁶ "From Little Bay de Noquet to Marquette and thence to Ontonagon, and from the two last named places to the Wisconsin State line; and also from Am-

grant and disposed of it to various companies. The lands were to be given the companies in sixty-section lots as each twenty miles of the road were completed, and were to be free from taxation for seven years. A board of control was provided which was to supervise the sale of the lands and to declare the grants forfeited in case the conditions were not fulfilled. A special tax of one per cent. on the cost of the road was levied and the legislature had power to increase this to two per cent. after ten years. The tax, however, was not to apply to the roads on the Upper Peninsula until after ten years, and the Detroit and Milwaukee and the Port Huron and Milwaukee were to be liable to an increase only in proportion to the lands received.¹⁷

The road from Little Bay de Noquet to Marquette was opened in 1864, and the same year it passed into the hands of the Chicago and Northwestern railroad company.¹⁸ A joint resolution of July 5, 1862,¹⁹ authorized the re-location of the road from Marquette to the state line, and an act of March 3, 1865,²⁰ recognized the route as via Bay de Noquet. Under these acts the Chicago and Northwestern built from the Wisconsin line to Escanaba (Bay de Noquet) in 1872.²¹ From 1878 the highest annual average which the Northwestern has obtained for its Michigan lands has been \$4.79, and the lowest \$1.65. In 1882 the highest point in annual sales was reached, 56,937 acres having been disposed of at that time. Of late years there has been a decrease in the lands sold, during 1897 the amount being 5,147 acres.²²

The time for the completion of the road from Marquette to Ontonagon was extended to December 31, 1872.²³ Within the time required the road was built from a point twenty miles west of Marquette to L'Anse, fifty-two miles.²⁴ The portion from L'Anse to Ontonagon has never been constructed, and an act of March 2, 1889, forfeited the lands opposite to the uncompleted portion of the road.²⁵

No portion of the Ontonagon and state line road was constructed within the time required, and in 1868 the governor released to the government the lands certified for the benefit of the road. In 1880 the board of control, ignoring the release of the governor, conferred the

boy, by Hillsdale and Lansing and from Grand Rapids to some point on or near Traverse Bay; also from Grand Haven and Pere Marquette to Flint and thence to Port Huron." *Statutes at Large*, xi, 21.

¹⁷ *Laws of Michigan*, 1857, 346-53.

¹⁸ Poor, *Railway Manual*, 1882, 672.

¹⁹ *Statutes at Large*, xii, 620.

²⁰ *Ibid.*, xiii, 520.

²¹ Poor, *Railway Manual*, 1882, 672.

²² *Annual Reports C. & N. W. Railroad*.

²³ *Statutes at Large*, xv, 252.

²⁴ Donaldson, *Public Domain*, 799.

²⁵ *Statutes at Large*, xxv, 1008.

grant on the Ontonagon and Brule River company.³⁶ In 1889 the grant was forfeited, with the exception of twenty miles from Ontonagon to Rockland.³⁷

The grant for a road from Amboy to a point on Traverse Bay was first conferred on the Amboy, Lansing, and Traverse Bay company. Later that portion of the grant north of Lansing was given to the Jackson, Lansing, and Saginaw company, and the portion south of Lansing to the Northern Central Michigan railroad company. The time for the completion of the road was in 1866 extended to June 3, 1873. The road was built from Lansing to Owasso, twenty-eight miles, by the Amboy, Lansing, and Traverse Bay company. By June 3, 1873, the Jackson, Lansing, and Saginaw company had built one hundred and sixty miles north from Owasso. By an act of March 3, 1873, the northern terminus of the road was changed from Traverse Bay to Mackinaw City, which point was reached by 1882. South of Lansing the building of sixty miles from Lansing to Jonesville was certified by the governor in 1873. The portion from Jonesville was never built.³⁸ No additional lands were granted by the change of the northern terminus, and there have been certified on account of this road 743,787 acres.³⁹

The grant for a road from Grand Rapids to Traverse Bay was assigned to the Grand Rapids and Indiana company. In 1865 the time for the building of the road was extended eight years, or until June 3, 1874. The road was opened to Traverse Bay in December, 1872.⁴⁰

The legislature had conferred the grant for a road from Grand Haven to Port Huron on two companies, the portion from Port Huron to Owasso on the Port Huron and Milwaukee, and the portion between Owasso and Grand Haven on the Detroit and Milwaukee. The later company accepted the grant, except as to the conditions of sections eleven and twenty of the act, which related to a control over the lands by the state, and the tax on the road. The board of control held that this was not a sufficient acceptance of the grant. The company built the road in 1859, but made no effort to claim the lands.⁴¹ Of the portion east of Owasso, thirty and five-tenths miles were built on time and the remaining sixty miles before 1890.⁴²

The grant from Pere Marquette to Flint was given to the Flint and Pere Marquette company. The time for the completion of the road

³⁶ Donaldson, *Public Domain*, 800.

³⁷ *Statutes at Large*, xxv, 1008.

³⁸ Donaldson, *Public Domain*, 798-9.

³⁹ Commissioner of the General Land Office, *Report*, 1897, 227.

⁴⁰ Poor, *Railway Manual*, 1882, 595, 597.

⁴¹ *Rogers v. Port Huron & Lake Michigan R. R.*, 45 Mich., 460.

⁴² *House Reports*, 1st sess. 51st Cong., No. 1179.

was fixed at March 3, 1876, and the road was opened in December, 1874.⁴³ There have been certified to the state on account of this grant 512,877 acres.⁴⁴

June 7, 1864, a further grant was made for a road from Fort Wayne, Indiana, to Grand Rapids.⁴⁵ This road was to form an extension of the road from Grand Rapids to Traverse Bay. The portion from Grand Rapids to Fort Wayne was built in 1870.⁴⁶

For most of the Michigan roads the information regarding the use of the lands has been too scanty to be of any importance in a general study of the subject.

WISCONSIN.

In 1856, under an act approved June 3, two grants were made to Wisconsin.⁴⁷ These were known as the Northwest and the Northeast grants, respectively, and were given by the legislature to different companies after a struggle which showed the worst possibilities of land-grant legislation. A bill was passed disposing of the two grants, the one to the La Crosse and Milwaukee, and the other to the Wisconsin and Lake Superior company. This was vetoed by Governor Bashford on account of numerous objections which he expressed regarding the bill.⁴⁸ These objections were only partially met by two new bills, disposing of the two grants on nearly the same terms, but these received his approval.

Charges of bribery and corruption in connection with these bills were soon heard, and in his message for 1858 Governor Randall called the attention of the legislature to these charges.⁴⁹ An investigating committee was appointed and their report revealed an astonishing state of affairs. They found that thirteen senators and fifty-nine assemblymen had received stock or bonds in the La Crosse and Milwaukee company, varying in value from \$5,000 to \$25,000. Governor Bashford's share in the plunder had been \$50,000 worth of bonds.⁵⁰ The committee were very positive in their statement of the case,⁵¹ and the testimony of Byron Kilburn that he "caused it to be understood, through

⁴³ Poor, *Railway Manual*, 1880, 661.

⁴⁴ Commissioner of the General Land Office, *Report*, 1897, 227.

⁴⁵ *Statutes at Large*, xiii, 119.

⁴⁶ Poor, *Railway Manual*, 1882, 595.

⁴⁷ "From Madison, or Columbus, by the way of Portage City to the St. Croix River or Lake between townships twenty-five and thirty-one, and from thence to the west end of Lake Superior; and to Bayfield, and also from Fond du Lac on Lake Winnebago, northerly to the State line." *Statutes at Large*, xl, 20.

⁴⁸ *Senate Journal*, 1856, 1143.

⁴⁹ *Governor's Message*, 1858, 23.

⁵⁰ *Report of Investigating Committee*, 5-7, 10.

⁵¹ "The evidence taken establishes the fact that the managers of the La Crosse and Milwaukee Railroad company have been guilty of numerous and unparalleled

the medium of persons not connected with the legislature, that in the event of the La Crosse company obtaining the grant, that company would acknowledge the favor by a liberal *douceur* or gratuity to such members as should favor its passage,"⁵² may be taken as very good proof of something so like bribery that perhaps only a railway president would have thought to have drawn the distinction.

The committee accused only the La Crosse and Milwaukee company of bribery in obtaining its grant; but Byron Kilburn claimed that the Wisconsin and Superior was equally guilty, and that the committee had "whitewashed" the officers of this company.⁵³ As this statement was made in a private communication and never published, Mr. Kilburn was undoubtedly sincere in making it; but I have found no evidence which would confirm the accusation.

The grant to the La Crosse company repeated the provisions of the act of Congress and also provided for the construction of the roads from Madison and Columbus to Portage by December 31, 1858. The company was to pay four per cent. on its gross earnings in lieu of all taxes. Lands remaining unsold after five years were to be publicly offered for sale in limited quantities, preference being given to actual settlers.⁵⁴ The grant to the Wisconsin and Superior company was very similar, except that three per cent. of the gross earnings was to be paid in lieu of taxes.

The La Crosse and Milwaukee, or the companies with which it had consolidated, had already built a road from Milwaukee to Portage, but which passed through Horicon instead of Columbus. This road was continued from Portage on the line of the land grant as far as Tomah, but there it turned west to La Crosse, which was reached in 1858. The line from Columbus to Portage was built in 1864, and the line from Madison to Portage in 1870.⁵⁵ Thus only the portion of the road from Portage to Tomah, sixty miles, was constructed according to the provisions of the original act.

On account of the failure to build the road from Madison and Columbus, Governors Randall and Salomon refused to certify the lands to the company.⁵⁷ But in 1868 the legislature provided that the lands patented to the state on account of the line between Portage and Tomah should

acts of mismanagement, gross violations of duty, fraud and plunder. In fact corruption and wholesale plundering are common features." *Ibid.*, 47.

⁵² *Ibid.*, App., 7.

⁵³ Kilburn to Downer, MS. in library of Wisconsin State Historical Society, pp. 9-11.

⁵⁴ *General Laws of Wisconsin*, 1856, 217.

⁵⁵ *Ibid.*, 239.

⁵⁶ Wisconsin Railroad Commissioner, *Report*, 1888, 387.

⁵⁷ Cary, *Organization and History C., M. & St. P. Railroad*, 22-3.

be granted to the Wisconsin Farm Mortgage Land company. This consisted of commissioners named in the act, who were to manage the lands in the interest of the farmers along the line who had subscribed for stock in the La Crosse and Milwaukee company and mortgaged their lands as security. Annual reports were to be made to the secretary of state.⁵⁸ The commissioners reported in 1874 that they had received 68,820 acres, of which 44,350 acres had been sold for \$45,628. Claims aggregating \$951,356 had been filed with them.⁵⁹ Subsequent reports of the commissioners were not published, and a search in the state archives has failed to reveal them.

In 1861 the grant from Madison and Columbus to Portage was taken from the La Crosse and Milwaukee company and given to the Sugar River Valley railroad company. The road was to be constructed by December 31, 1863.⁶⁰ In 1866 the time for building the road was extended to December 31, 1869, and the company relieved from the obligation of building from Columbus to Portage.⁶¹ In 1870 the Madison and Portage company, which had purchased the property of the Sugar River Valley company was given the same rights to the grant.⁶²

There were no government lands between Madison and Portage by the time the road was built, and the company claimed indemnity lands from the grant north of Tomah. This claim was disallowed and no lands have been received for this portion of the road. The government endeavored to treat the line as a land-grant road in regard to the compensation for carrying mail, but this point was decided in favor of the company.⁶³

That portion of the land grant from Tomah to Lake St. Croix was in 1863 resumed by the state and given to a company which afterward became the St. Paul, Minneapolis and Omaha. The grant from St. Croix to Bayfield was conferred on another company, which failed to consolidate with the Omaha company and built the road.⁶⁴ Another company, which had applied for it, but which afterward refused to accept it. It was then given to the North Wisconsin company, which consolidated with the Omaha company and built the road.⁶⁵ Congress had meanwhile, by act of May 5, 1864, renewed the grant with limits increased to ten and twenty miles. The time for the completion of the road was extended five years from the passage of the

⁵⁸ *Private and Local Laws of Wisconsin*, 1868, 1149.

⁵⁹ Wisconsin Railroad Commissioner, *Report*, 1874, 237.

⁶⁰ *Private and Local Laws of Wisconsin*, 1861, 333.

⁶¹ *Ibid.*, 1866, 1345.

⁶² *Ibid.*, 1870, 284.

⁶³ Cary, *Organization and History C., M. & St. P. Railroad*, 200.

⁶⁴ *Ibid.*

act, or three years beyond the original time.⁶⁵ The road as built by the Omaha company did not begin at Tomah, but at Elroy, near Tomah, but on the Chicago and Northwestern line. As thus located the road was built to Lake St. Croix in 1872, to Bayfield in 1883, and to Superior in 1884.⁶⁶

On account of the continuity of the grant of 1856 it was claimed that deficiencies along one section of the road could be made up from the indemnity limits of another section. But it was decided by the United States Circuit court that the effect of the act of 1864 was to make distinct grants and to break up the continuity of the former grant, so that each company was confined to its own portion of the road.⁶⁷

For the grant from Tomah to St. Croix, the state has received 813,706 acres; for the St. Croix and Superior grant, 854,221 acres, and for the Bayfield branch, 503,018 acres.⁶⁸ By 1880 there had been sold of the grant from Tomah to St. Croix, 330,127 acres. Of these 77,374 acres had been sold for \$307,654. The price of the remainder, which had been sold by the West Wisconsin company, is not obtainable.⁶⁹ The company has since acquired the land grants to Minnesota and Iowa for the St. Paul and Sioux City and the Sioux City and St. Paul roads. Under all the grants the company has received 2,183,867 acres, of which it has disposed of 1,774,060 acres. The cash receipts have amounted to \$8,000,856, and there are due on time sales \$91,011.⁷⁰

The northeast grant, as before stated, was given to the Wisconsin and Superior railroad company. A resolution of Congress of April 25, 1862, made some slight changes in the route, but provided that the lands granted should not be affected.⁷¹ This company soon became the Chicago and Northwestern and built the road to Fort Howard in 1862, and to the state line in 1871.⁷² Under the grant 546,446 acres have been received by the state.⁷³ Of these there remained unsold on May 31, 1897, 281,974 acres.⁷⁴ The sale of lands has never been very rapid, the highest mark being reached in 1882, when 14,656 acres were disposed of. Of late years it has not risen much above 1,000 acres a year. The average price obtained for the lands has varied from \$11.27, in 1885, to \$1.65 in 1888. In 1897 it was \$5.55. From the lands the company has

⁶⁵ *Statutes at Large*, xiii, 66.

⁶⁶ Wisconsin Railroad Commissioner, *Report*, 1888, 389.

⁶⁷ *Madison & P. R. Co. v. Wisconsin, et al. Federal Cases*, xvi, 366.

⁶⁸ Commissioner of the General Land Office, *Report*, 1897, 228.

⁶⁹ Donaldson, *Public Domain*, 779.

⁷⁰ Railroad Commissioner, *Report*, 1897, 119.

⁷¹ *Statutes at Large*, xii, 618.

⁷² Wisconsin Railroad Commissioner, *Report*, 1888, 388.

⁷³ Commissioner General Land Office, *Report*, 1897, 228.

⁷⁴ Chicago and Northwestern Co., *Report*, 1897, 20.

obtained since 1878, when the first separate reports are given, \$658,424. This includes the amount received from trespass and stumpage, which in Wisconsin frequently exceeded the receipts from land sales.⁷⁵ For its entire system, including grants in Wisconsin, Minnesota, and Michigan, the company has received 3,091,669 acres, of which it has sold 2,422,796 acres, for \$8,715,350, with \$849,311 due on contracts.⁷⁶ In its report for 1898 the company credited its land department with a balance of \$2,374,516.⁷⁷

The act of May 25, 1864, in addition to the renewal of the previous grants, contained a provision for another road from the central portion of the state to Lake Superior.⁷⁸ The legislature gave this grant to two companies. The Portage and Superior railroad company, incorporated April 9, 1866, received the lands for a road from Portage to Stevens Point, and one-half of the lands from Stevens Point to Superior. The road was to be exempt from taxation and to pay three per cent. of its gross earnings to the state.⁷⁹ An act of April 6 gave one-half of the grant from Stevens Point to Superior to the Winnebago and Lake Superior railroad company under the same conditions. Consolidation with the Chicago and Northwestern was forbidden.⁸⁰

As might have been expected, the two companies soon united as the Portage, Winnebago, and Superior railroad company.⁸¹ In 1871 it became the Wisconsin Central Railroad company, which built the road. By an act of Congress of April 9, 1874, the time within which the road was to be built was extended to December 31, 1876.⁸² By that time the division between Portage and Stevens Point was constructed and all but the ten miles between Butternut Creek and Chippewa Crossing, on the Stevens Point and Ashland division, which were built in 1877.⁸³

The company has received 834,999 acres under the grant, with 49,834 acres estimated as still due.⁸⁴ Up to 1880 it had sold 88,977 acres for \$229,325, while the sale of stumpage from the lands had amounted to \$222,343.⁸⁵ In 1890 the sales had been 268,194 acres for \$765,041, while the receipts from stumpage had been \$962,960.⁸⁶

⁷⁵ See Chicago and Northwestern Co., *Reports*, 1875-97.

⁷⁶ Railroad Commissioner, *Report*, 1897, 108.

⁷⁷ Chicago and Northwestern Co., *Report*, 1898, 39.

⁷⁸ "From Portage City, Berlin, Doty's Island or Fon [sic] du Lac, as said state may determine, in a northwestern direction to Bayfield, and thence to Superior, on Lake Superior." *Statutes at Large*, xiii, 66.

⁷⁹ *Private and Local Laws of Wisconsin*, 1866, 869.

⁸⁰ *Ibid.*, 730.

⁸¹ *Ibid.*, 1869, 578.

⁸² *Statutes at Large*, xviii, 28.

⁸³ Wisconsin Railroad Commissioner, *Report*, 1888, 391.

⁸⁴ Commissioner General Land Office, *Report*, 1897, 228, 224.

⁸⁵ *Report to Trustees Wisconsin Central Co.*, 1880, 36.

⁸⁶ Wisconsin Central Co., *Second Report*, 1890, 39.

MINNESOTA.

A grant was made to Minnesota in 1853, but this was immediately repealed,⁸⁷ so that it was not until 1857 that a permanent grant was secured. On March 3d of that year a grant of lands was made to the state for various roads.⁸⁸ In 1865 these grants were changed to ten and twenty miles, and the time for the completion of the road extended to eight years from the passage of that act.⁸⁹ An act of the Minnesota legislature of May 22, 1857, accepted the grant, assigning to the Minnesota and Pacific company that portion of the grant for a road from Stillwater, via St. Paul and St. Anthony, fixing the terminus at Breckinridge, and the branch via St. Cloud to St. Vincent; to the Root River Valley and Southern Minnesota company the grant from St. Paul, via Shakopee Junction to the southern boundary of the state, and the grant from La Crescent to the junction with the road from Winona (fixed at Rochester); to the Transit railroad company the grant from Winona to the Big Sioux river, and to the Minneapolis and Cedar Valley company the grant from Minneapolis to the southern boundary of the state. The roads were to pay three per cent. on their gross earnings in lieu of all taxes.⁹⁰

The Constitution of the state prohibited the loan of its credit in aid of the railroads, but in 1858 an amendment was adopted by a vote of 25,023 to 6,733 allowing an issue of bonds in aid of the land-grant roads. In 1860 the further issue of bonds was prohibited.⁹¹ Under this law bonds to the amount of \$200,000 for each road were issued by the state.

The Minnesota and Pacific was surveyed and located, but no work was done on the road. In 1859 the company defaulted on the interest on its bonds and the mortgage on the lands was foreclosed. In 1861 the legislature relieved the road from all claims of the state against it on

⁸⁷ *Supra*, pp. 51-53.

⁸⁸ "From Stillwater, by way of Saint Paul and Saint Anthony, to a point between the foot of Big Stone Lake and the mouth of Sioux Wood River, with a branch via Saint Cloud and Crow Wing, to the navigable waters of the Red River of the north, at such point as the Legislature of said Territory may determine; from St. Paul and from Saint Anthony, via Minneapolis, to a convenient point of junction west of the Mississippi, to the southern boundary of the Territory in the direction of the mouth of the Big Sioux River, with a branch, via Faribault, to the north line of the State of Iowa, west of range sixteen; from Winona, via St. Peters, to a point on the Big Sioux river, south of the forty-fifth parallel of north latitude; also from La Crescent, via Target Lake, up the valley of Root River, to a point of junction with the last mentioned road, east of range seventeen." *Statutes at Large*, xi, 195.

⁸⁹ *Ibid.*, xiii, 526.

⁹⁰ *Session Laws of the Territory of Minnesota*, Extra Session, 1857, 3-26.

⁹¹ Neill, *History of Minnesota*, 630-31.

consideration of the completion of the road. No work having been done in 1862, the rights enjoyed by the Minnesota and Pacific were granted to the St. Paul and Pacific company.⁹² The portion of the line from St. Anthony to Breckenridge, known as the first division of the St. Paul and Pacific, was built in 1871,⁹³ within the time required. This line became later a part of the St. Paul, Minneapolis, and Manitoba, now Great Northern, system. Under the grant there have been patented for the company 1,253,468 acres, with 195,366 acres still due.⁹⁴ Up to 1877 there had been sold of this grant and the one for the line to St. Vincent 458,865 acres for \$3,651,641,⁹⁵ and by 1897 there had been 2,052,282 acres sold, for \$8,242,583, with \$1,295,244 outstanding. The company still owned 794,364 acres.⁹⁶ When the state boundaries of Minnesota were adjusted, it was found that part of this grant was in the territory of Dakota, but this has always been treated as if it were in Minnesota.⁹⁷

In 1871 the route of the branch of the St. Paul and Pacific was changed so that a more direct line could be secured.⁹⁸ Two hundred and eight miles were completed by 1876, the time required, and the remainder was finished in 1881.⁹⁹ This also became a part of the St. Paul, Minneapolis and Manitoba, and its lands have been treated in connection with that road.

Under the act of 1871, re-locating the branch of the St. Paul and Pacific, the Western Railroad of Minnesota had built from Brainard to Crow Wing in 1878. The distance was fifty-four and two-tenths miles, but for sixteen and one-tenth miles in the Fort Ripley reservation no lands were received.¹⁰⁰ There have been patented for the company 666,865 acres,¹⁰¹ but information as to their disposal is not obtainable.

The Root River Valley and Southern Minnesota company failed to build the line from St. Paul to the Iowa line and in 1864 the grant was given to the Minnesota Valley company, afterward the St. Paul and Sioux City company. This built to the line between Minnesota and Iowa in 1870, forming a connection with the Sioux City and St. Paul.¹⁰² The state has received 1,123,578 acres on account of the grant.¹⁰³ Up

⁹² *Farnsworth v. Minn. & Pac. R. Co.*, 92 U. S., 49.

⁹³ Poor, *Railway Manual*, 1884, 747.

⁹⁴ Commissioner of the General Land Office, *Report*, 1897, 228, 223.

⁹⁵ Donaldson, *Public Domain*, 779.

⁹⁶ Railroad Commissioner, *Report*, 1897, 150.

⁹⁷ *St. Paul, M. & M. Co. v. Phelps*, 137 U. S., 528.

⁹⁸ *Statutes at Large*, xvii, 631.

⁹⁹ Nell, *History of Minnesota*, 787.

¹⁰⁰ Donaldson, *Public Domain*, 803-4.

¹⁰¹ Commissioner of the General Land Office, *Report*, 1897, 229.

¹⁰² Poor, *Railway Manual*, 1880, 830.

¹⁰³ Commissioner of the General Land Office, *Report*, 1897, 229.

to 1880 there had been sold 324,543 acres for \$2,099,387.¹ Since then the line has been owned by the Chicago, St. Paul, Minneapolis and Omaha.

The other portion of the grant to the Root River Valley company, providing for a road from La Crescent to the junction with the Winona and St. Peter road, was in 1864 conferred on the Southern Minnesota railroad company. In 1866 Congress made a grant for a road from Houston to the western boundary of the state. The grant amounted to five sections a mile on each side of the road and the road was to be finished within ten years.² The Southern Minnesota had built to Winnebago, one hundred and sixty-seven miles, in 1870.³ In 1878 the legislature conferred the grant of 1866 upon the Southern Minnesota Railway Extension company, requiring the completion of the road by the last of 1880.⁴ The road was built to Flandrau, Dakota, by January 1, 1880.⁵ The road as constructed was not on the line of the original grant, but the interior department decided that the divergence was not enough to forfeit the grant.⁶ The state has received 546,284 acres on account of the grant,⁷ information as to which is lacking. The road is now owned by the Chicago, Milwaukee, and St. Paul company.

The Transit railway was sold under foreclosure by the state in 1860, and the Winona and St. Peter was chartered to build the road in 1862. By this company the road was constructed to New Ulm in 1872, and to the Dakota line in 1874.⁸ The road has received 1,678,618 acres under its grant.⁹ Up to 1880 it had sold 557,574 acres, for \$1,045,801.¹⁰ From 1880 to 1890 there had been sold 861,303 acres, for \$3,409,981, and from 1890 to 1897 the sales amounted to 272,508 acres for \$2,077,435.¹¹ An interesting feature of the sale of these lands was the fact that Archbishop Ireland acted as an agent for their sale, in order to establish a colony of immigrants in Minnesota.¹²

The Minneapolis and Cedar Valley railroad company became the Minneapolis, Faribault, and Cedar Valley company, and later the Minnesota Central Railway company. In 1866 it had built seventy-one miles of road, to Owatonna, and in that year the road was sold to the Mc-

¹ Donaldson, *Public Domain*, 779.

² *Statutes at Large*, xiv, 87.

³ Cary, *C., M. & St. Paul Road*, 164.

⁴ *Special Laws of Minnesota*, 1878, 537.

⁵ Cary, *C., M. & St. Paul Road*, 167.

⁶ Commissioner of the General Land Office, *Report*, 1880, 520.

⁷ *Ibid.*, 1897, 229.

⁸ Poor, *Railway Manual*, 1880, 837.

⁹ Commissioner of the General Land Office, *Report*, 1897, 229.

¹⁰ Donaldson, *Public Domain*, 779.

¹¹ Chicago & Northwestern Railroad, *Reports*, 1880-1897.

¹² *Ibid.*, 1880, 26.

Gregor Western company, the Minnesota Central retaining the lands.¹² The former company built to Owatonna, via Austin in 1867.¹⁴ This, however, brought the road east of range sixteen at the state line. In 1870 the Minnesota Central company built from Austin to the state line, thus earning the grant.¹⁵ 179,734 acres have been patented on account of this grant, no information concerning which is given in the report of the company.¹⁶

May 5, 1864, an act was signed granting lands for a railroad from St. Paul to the head of Lake Superior.¹⁷ The road should have been built May 5, 1872, but was not finished until February 28, 1873.¹⁸ Up to June 30, 1880, of the 860,564 acres patented only 28,964 had been sold for \$106,462.¹⁹ By 1886, 308,955 acres had been sold for \$1,157,054,²⁰ and by 1897, 526,687 acres for \$2,558,589.²¹

The act of July 6, 1866, also made a grant for a road from Hastings to the western boundary of the state.²² This grant was in 1867 conferred upon the Hastings, Minnesota, and Red River of the North railroad company, the name of the company being the same year changed to the Hastings and Dakota. The road was built to the state line in 1879.²³ There have been patented to the state on account of this grant 364,628 acres.²⁴ Information as to their disposal is lacking.

IOWA.

In 1856 Iowa received a grant for four railroads across the state from east to west.²⁵ The discussion over this act in Congress has already been noted, as has also the opposition of the river towns to the east and west grants.²⁶ The Iowa legislature, by an act of July 14, 1856,

¹² Cary, *C., M. & St. Paul Road*, 151-159.

¹⁴ *Ibid.*, 96.

¹⁵ *Ibid.*, 160.

¹⁶ Railroad Commissioner, *Report*, 1897, 114.

¹⁷ *Statutes at Large*, xiii, 64.

¹⁸ Donaldson, *Public Domain*, 805.

¹⁹ *Ibid.*, 779.

²⁰ Railroad Commissioner, *Report*, 1886, 598.

²¹ *Ibid.*, 1897, 147.

²² *Statutes at Large*, xiv, 87.

²³ Cary, *C., M. & St. Paul Road*, 175-181.

²⁴ Commissioner of the General Land Office, *Report*, 1897, 229.

²⁵ "From Burlington, on the Mississippi River, to a point on the Missouri River near the mouth of the Platte River; from the city of Davenport, via Iowa City and Fort Des Moines, to Council Bluffs; from Lyons City northwesterly to a point of intersection with the main line of the Iowa Central Air Line Railroad, near Maquoketa, thence on said main line, running as near as practicable to the forty-second parallel across the said State to the Missouri River, from the city of Dubuque to a point on the Missouri River near Sioux City, with a branch from the mouth of the Tete Des Morts to the nearest point on said road." *Statutes at Large*, xi, 9.

²⁶ *Supra*, pp. 53-54, 40.

accepted the grant and gave the lands for the road from Burlington to the Missouri to the Burlington and Missouri River railroad company; from Davenport to Council Bluffs, to the Mississippi and Missouri railroad company; from Lyons to the Missouri river, to the Iowa Central Air Line railroad company; and from Dubuque to Sioux City, to the Dubuque and Pacific railroad company. Each company was to construct seventy-five miles within three years, from December 1, 1856, thirty miles a year for five years thereafter, and the remainder in one year, that is by December 1, 1865. In case of failure to carry out the conditions, the state could resume the grant.²⁷

The first road, the Burlington and Missouri River, was constructed on time. It has received under the grant 389,989 acres,²⁸ of which in 1880 it had sold 283,014 acres for \$3,430,572.²⁹ Since that time the sales were slow, but the lands were practically all disposed of by 1888. The average price received for the lands was \$11.79 an acre, and the total amount realized was \$5,829,165, of which \$4,870,890 was above taxes and expenses.³⁰

In 1866, one hundred and thirty miles of the Mississippi and Missouri river road had been constructed and in June, 1869, it was finished to the Missouri river.³¹ The legislature had meanwhile, in 1868, granted the lands to the Chicago and Rock Island Railroad company which had purchased the Mississippi and Missouri road. The company was required to build the road to the Missouri within two years.³² Up to 1880 the sales of land by this road had amounted to 371,854 acres for \$2,944,374.³³ By 1891, lands to the amount of 547,173 acres were reported as sold,³⁴ which amount seems to have been in excess of the lands actually due the company.³⁵ These lands were sold at an average of \$8.81 an acre and the total amount received from land sales to 1891 was \$5,796,639, or an excess of \$4,887,260 above taxes and expenses of management.³⁶

By an act of March 17, 1860, the grant to the Iowa Central Air Line company was resumed by the legislature, as no part of the line had been constructed.³⁷ The grant was then given to the Cedar Rapids and

²⁷ *Laws of Iowa*, 1856, 1. See Dey, *Railroad Legislation in Iowa*; in *Iowa Historical Record*, ix, 547-8.

²⁸ Commissioner of the General Land Office, *Report*, 1897, 226.

²⁹ Donaldson, *Public Domain*, 779.

³⁰ Iowa Railroad Commissioners, *Report*, 1888, 174.

³¹ Poor, *Railway Manual*, 1885, 664.

³² *Laws of Iowa*, 1868, 13.

³³ Donaldson, *Public Domain*, 779.

³⁴ Iowa Railroad Commissioners, *Report*, 1891, 212.

³⁵ Commissioner of the General Land Office, *Report*, 1897, 226-7.

³⁶ Iowa Railroad Commissioners, *Report*, 1891, 212.

³⁷ *Laws of Iowa*, 1860, 29.

Missouri River Railroad company which was to build the road by December 1, 1865.³⁸ By 1864 the company had built from Cedar Rapids about one hundred miles west, while the Chicago, Iowa, and Nebraska company had built from a point on the Mississippi, three miles from Lyons, to Cedar Rapids. In 1864 an act was passed by Congress which relieved the company of the obligation to build from Lyons to the line of the Chicago, Iowa, and Nebraska road; allowed a change of the route west of Cedar Rapids, and, if the new route should not pass through Onawa, required a branch to be built to that city; and also required the construction of a branch to the line of the Mississippi and Missouri.³⁹

The provisions of this act were not fully carried out, as the connection with the Mississippi and Missouri was not built, nor was the branch to Onawa, although the line passed fifteen miles from that city. The difference between the road as actually constructed and as first located was seventy-four miles. The company claimed lands for the length of the original location but this was not allowed.⁴⁰ Of the lands patented for this road the first one hundred sections were given to the Iowa Central Air Line company by a decision of the supreme court.⁴¹ Up to 1869 the Cedar Rapids company had sold 46,049 acres for \$220,559. In that year all the remaining lands of the company and those which should thereafter be certified to it, were sold to the Iowa Railroad Land company for \$800,000.⁴² I have been unable to find anything as to the disposal of the lands by this company.

In 1868 the lands which had been granted to the Dubuque and Pacific were resumed by the state on the ground of the non-fulfillment by the company of the conditions of the granting act. This act, however, reserved to the company the right to all lands actually earned.⁴³ The company had built the road as far as Iowa Falls and an agreement had been made with the Iowa Falls and Sioux City company by which the latter was to build the remainder of the road.⁴⁴ This agreement was ratified by the legislature,⁴⁵ and the road built to Fort Dodge the next year, when it was leased to the Illinois Central, which completed it to Sioux City.⁴⁶ In 1878 the treasurer of the Dubuque and Sioux City company stated that he was unable to furnish information as to the land grant and said that it had been a constant

³⁸ *Ibid.*, 40.

³⁹ *Cedar Rapids & Mo. R. Co. v. Herring*, 110 U. S., 27.

⁴⁰ *Ibid.*

⁴¹ *Cedar Rapids & Mo. River R. Co. v. Courtwright*, 21 Wallace, 310.

⁴² Iowa Railroad Commissioners, *Report*, 1878, 197.

⁴³ *Laws of Iowa*, 1868, 29.

⁴⁴ Iowa Railroad Commissioners, *Report*, 1879, 109.

⁴⁵ *Laws of Iowa*, 1868, 164.

⁴⁶ Iowa Railroad Commissioners, *Report*, 1879, 109.

source of annoyance and loss to the company.⁴⁷ In 1880 it was reported that the two companies had sold 314,275 acres for \$2,098,994.⁴⁸ By 1886 all but 26,448 acres had been disposed of. The average price received was \$6.85, while the net income from the lands was \$3,676,902.⁴⁹

In 1864 a further grant was made to Iowa for two roads, one from Sioux City to the northern boundary of the state and the other from McGregor west to the Sioux City road.⁵⁰

The lands in aid of a road from Sioux City to the Minnesota line were granted by the state to the Sioux City and St. Paul Railway company,⁵¹ and the grant for the McGregor Western accepted and held in trust for that company.⁵²

The Sioux City and St. Paul company built its line from the state line to Le Mars, a distance of 56 miles. Meanwhile the Dubuque and Sioux City company had built its road to Sioux City, via Le Mars, so that there was a line from that city to Sioux City when the Sioux City and St. Paul company reached it. An agreement was made whereby the line was to be used by the Sioux City and St. Paul company for its through traffic, while doing no local business between Le Mars and Sioux City.⁵³ The company received certificates from the governor for the construction of 50 miles of road, but, as the line was to be built in 10-mile sections, the remaining 6 miles were not certified and no lands were received by the company.⁵⁴ Suit was brought for the lands adjacent to the last 6 miles but the supreme court of Iowa decided that the company was only entitled to land for completed sections of 10 miles.⁵⁵

This road crossed the line of the Chicago, Milwaukee, and St. Paul, formerly the McGregor Western, at Sheldon, thus causing a conflict between the lands granted the road. By a decision of the supreme court, lands within the ten mile limits of one road and the twenty mile

⁴⁷ *Ibid.*, 1878, 275.

⁴⁸ Donaldson, *Public Domain*, 779.

⁴⁹ Iowa Railroad Commissioners, *Report*, 1886, 336.

⁵⁰ "From Sioux City in said State, to the south line of the State of Minnesota, at such point as the said State of Iowa may select between the Big Sioux and the west fork of the Des Moines river; also . . . for the use and benefit of the McGregor Western Railroad Company, for the purpose of aiding in the construction of a railroad from a point at or near the foot of Main street, South McGregor, in said state, in a westerly direction, by the most practicable route, on or near the forty-third parallel of north latitude, until it shall intersect the said road running from Sioux City to the Minnesota State line, in the county of O'Brien in said state." *Statutes at Large*, xiii, 72.

⁵¹ *Laws of Iowa*, 1866, 143.

⁵² *Ibid.*, 189.

⁵³ *Senate Reports*, 1st sess. 49 Cong., No. 45.

⁵⁴ *Ibid.*

⁵⁵ *Sioux City and St. Paul R. Co. v. Countryman*, 83 Iowa, 172.

limits of the other were given to the former; lands within the ten mile limits of both roads were evenly divided, as were lands within both twenty mile limits;⁵⁵ the general rule in regard to conflicting limits, however, was that priority of selection gave the right to such lands.⁵⁷ Little further information can be obtained concerning the lands. This road has become a part of the Chicago, St. Paul, Minneapolis and Omaha system.

In 1868 the grant to the McGregor Western was resumed by the state and the lands granted to the McGregor and Sioux City company.⁵⁸ At that time it had been constructed as far as Calmar, while in 1870 it was built to Algona and conveyed to the Chicago, Milwaukee and St. Paul company. No further work was done on the road until 1878, after the time for its completion had elapsed. In 1876 the grant had, however, been renewed, but on terms which the McGregor Western refused to accept. In 1879 the lands were given to the St. Paul company, which in 1879 built to the state line.⁵⁹ By 1891 this company had disposed of practically all of the lands received under the grant, some 372,000 acres, and had received for them \$1,601,766.⁶⁰

We have still to consider the Des Moines River grant. This was originally a grant, made in 1846, of the alternate sections for ten miles on each side of the Des Moines River from its mouth to the Racoon Fork, to aid in the improvement of the river.⁶¹ In 1862 the grant was extended to include the alternate sections for five miles on each side of the river from the Racoon Fork to the north boundary of the state, and permission was given to apply a portion of the lands to the aid of the Keokuk, Fort Des Moines and Minnesota railroad.⁶² Under the first grant it was claimed that lands north of Des Moines⁶³ were included but this was disallowed.⁶⁴ It was later decided, however, that the odd-numbered sections within five miles of the river were so far reserved that they did not pass with the grant of 1856.⁶⁵

In 1858 the legislature of Iowa granted the Des Moines river lands to the Keokuk, Fort Des Moines and Minnesota Railroad company, reserving those lands which had been previously conveyed to the Des Moines Navigation and Railroad company. Seventy-five miles of the road were

⁵⁵ *Sioux City & St. Paul R. Co. v. C., M. & St. P. R. Co.*, 117 U. S., 406.

⁵⁷ *St. Paul & Sioux City R. Co. v. Winona & St. Peter R. Co.*, 112 U. S., 720.

⁵⁸ *Laws of Iowa*, 1868, 20.

⁵⁹ Cary, *Organization and History of the C., M. & St. P. Railroad*, 114-15.

⁶⁰ Iowa Railroad Commissioners, *Report*, 1891, 28-9. The report of the land office shows only 325,000 acres patented for this company. *Report*, 1897, 227.

⁶¹ *Statutes at Large*, ix, 77.

⁶² *Ibid.*, xii, 543.

⁶³ The Racoon Fork was at Des Moines.

⁶⁴ *Dubuque & P. R. Co. v. Litchfield*, 23 Howard, 68.

⁶⁵ *Wolcott v. Des Moines Co.*, 5 Wallace, 681.

to be completed within three years and the whole road by 1863.⁶⁶ The road was built from Keokuk to Bentonsport in 1857, to Ottumwa in 1859 and to Des Moines in 1866. In 1878 it was leased to the Chicago, Rock Island and Pacific.⁶⁷ Any information as to the disposition of the lands received by this company cannot be obtained.⁶⁸ The road was continued to Fort Dodge under the name of the Des Moines and Fort Dodge railroad. Information as to the lands of this road is also lacking.

ALABAMA AND MISSISSIPPI.

An amendment to the Illinois Central act of 1850 granted lands to Alabama and Mississippi for a railroad from Mobile to the mouth of the Ohio river.⁶⁹ This grant was conferred by the legislatures of Alabama and Mississippi on the Mobile and Ohio company, which built the road by September, 1859.⁷⁰ There have been patented for the company 1,156,659 acres.⁷¹ These lands sold very slowly and in 1880 the company held 1,162,401 acres, valued at \$567,125.⁷² From the sales of its lands up to 1865 the company had received \$252,237.⁷³ The exact amount received since then I have been unable to determine. The yearly receipts have been quite small.

By an act of June 3, 1856, further grants were made to Alabama for a number of roads within that state and extending into the neighboring states.⁷⁴ The grant from Gunter's Landing to Gadsden was conferred

⁶⁶*Laws of Iowa*, 1858, 195.

⁶⁷*Iowa Railroad Commissioners, Report*, 1879, 110.

⁶⁸*Ibid.*, 1878, 46.

⁶⁹"And be it further enacted, That in order to aid in the continuation of said Central Railroad from the mouth of the Ohio river to the city of Mobile, all the rights, privileges, and liabilities hereinbefore conferred on the State of Illinois shall be granted to the States of Alabama and Mississippi respectively, for the purpose of aiding in the construction of a railroad from said city of Mobile to a point near the mouth of the Ohio river, and that public lands of the United States, to the same extent in proportion to the length of the road, on the same terms, limitations and restrictions in every respect shall be, and is hereby, granted to said States of Alabama and Mississippi respectively." *Statutes at Large*, ix, 467.

⁷⁰Poor, *Railway Manual*, 1877-78, 215. In 1859 the time for the completion of the road was extended to Sept. 20, 1865. *Statutes at Large*, xi, 384.

⁷¹Commissioner of the General Land Office, *Report*, 1897, 225.

⁷²Poor, *Railway Manual*, 1881, 425.

⁷³*Reports of Committees*, 2nd sess. 39th Cong., no. 34, p. 848.

⁷⁴"From the Tennessee River, at or near Gunter's Landing, to Gadsden, on the Coosa River; from Gadsden to connect with the Georgia and Tennessee line of railroads, through Chattooga, Wills, and Lookout Valleys; and from Elyton to the Tennessee River at or near Beard's Bluff, Alabama . . .

"SECTION 6. And be it further enacted, That a grant of lands shall be made to said state to aid in the construction of the following railroads, to-wit: The Memphis and Charleston Railroad, extending from Memphis on the Mississippi

on the Coosa and Tennessee Railroad company. This had not been built in 1890 and was included in the general forfeiture act of that year.⁷⁵

Under the grant for a road from Gadsden to the Georgia line two companies were organized, one to construct the road through the Chatooga valley and the other through the Wills and Lookout valleys. The latter company received the grant from the state.⁷⁶ In 1868 it consolidated with the Northeast and Southwest Alabama, which had received the grant from Gadsden to the Mississippi line. In 1869 the time for the construction of these lines was extended to April 10, 1872, and they were completed during 1871.⁷⁷

The grant for a road from Elyton to the Tennessee river was given to the Elyton and Beard's Bluff Railway company. No map of the road was ever filed and no work has been done on it.⁷⁸

The state refused to accept the grant in aid of the Memphis and Charleston road and the lands were restored to market February 19, 1858.⁷⁹

The Mobile and Girard company built fifty-four miles from Girard toward Mobile within the time required by the law, and to Troy, thirty miles further, before the forfeiture of 1890.⁸⁰ There had been certified to the company 504,167 acres, of which 201,985 were restored to the public domain.⁸¹

Of the Coosa and Alabama road (later the Selma, Rome, and Dalton) one hundred and forty-three miles were constructed on the line of definite location filed with the secretary of the interior. Of these one hundred miles were built within the time required by law.⁸² No attempt was made by the company to build the remainder of the line as located, so that the portion to Gadsden was forfeited in 1890.⁸³

The grant to the North and South Alabama was renewed in 1871 and

River in Tennessee, to Stevenson on the Nashville and Chattanooga Railroad in Alabama; the Girard and Mobile railroad, from Girard to Mobile, Alabama; the Northeast and Southwestern Railroad, from near Gadsden to some point on the Alabama and Mississippi State line, in the direction of the Mobile and Ohio Railroad; the Coosa and Alabama Railroad, from Selma to Gadsden; the Central Railroad from Montgomery to some point on the Alabama and Tennessee State line in the direction to Nashville, Tennessee." *Statutes at Large*, xi, 17-18.

⁷⁵ Commissioner of the General Land Office, *Report*, 1891, 39.

⁷⁶ Donaldson, *Public Domain*, 792.

⁷⁷ *House Reports*, 1st sess. 48th Cong., no. 2016.

⁷⁸ Donaldson, *Public Domain*, 792.

⁷⁹ *Ibid.*, 792.

⁸⁰ *House Reports*, 1st sess. 51st Cong., no. 1179, p. 3.

⁸¹ Commissioner of the General Land Office, *Report*, 1893, 54.

⁸² Donaldson, *Public Domain*, 793.

⁸³ Commissioner of the General Land Office, *Report*, 1891, 39.

⁸⁴ *Statutes at Large*, xvi, 580.

the road required to be constructed within three years,⁸⁴ which was done.

In 1857 a grant was made for a road "from the line of Georgia on the Chattahoochee river to the city of Mobile, Alabama," with a branch from Eufaula to Montgomery.⁸⁵ No map of location for the road was filed and no portion of it has been constructed.⁸⁶

I have been able to obtain practically no information as to the disposal of the lands received by the various companies in Alabama.

By an act of August 11, 1856, Mississippi received a grant of lands for railroads "from Jackson to the line between Mississippi and Alabama; from Tuscaloosa to the Mobile railroad within Mississippi, and from Brandon to the Gulf of Mexico," and from Mobile to New Orleans.⁸⁷

The first road (now the Vicksburg and Meridian) was completed on time. Information as to its land transactions is lacking. There have been patented for the use of the road 198,028 acres.⁸⁸

For the roads from Tuscaloosa to the Mobile road and from Mobile to New Orleans no maps of location were filed nor were any lands certified to the states on account of the grants.⁸⁹

The land grant road from Brandon to the gulf (known as the Gulf and Ship Island) was built as far south as Hattiesburg before the forfeiture of 1890. In that act there was a proviso giving the company one year to build the remainder of its road. This was not done and the lands have been forfeited. There have been patented on account of this grant 138,478 acres.⁹⁰

FLORIDA.

An act of May 17, 1856, made grants for various roads in Florida and for a road from Pensacola to Montgomery.⁹¹ The first grant was given to two companies, the Florida, Atlantic, and Gulf Central to build from Jackson to Lake City and the Pensacola and Georgia from Lake City to Pensacola. These companies afterward consolidated as the Florida Central and Western Company. The line from Jacksonville, fifty-nine

⁸⁴ *Statutes at Large*, xl, 197.

⁸⁵ Donaldson, *Public Domain*, 794.

⁸⁶ *Statutes at Large*, xl, 30.

⁸⁷ Commissioner of the General Land Office, *Report*, 1897, 225.

⁸⁸ Donaldson, *Public Domain*, 791.

⁸⁹ Commissioner of the General Land Office, *Report*, 1897, 225.

⁹¹ "From St. Johns River, at Jacksonville, to the waters of Escambia Bay, at or near Pensacola; and from Amelia Island, on the Atlantic, to the waters of Tampa Bay, with a branch to Cedar Key, on the Gulf of Mexico; and also a railroad from Pensacola to the State line of Alabama, in the direction of Montgomery" [line continued to Montgomery by section six]. *Statutes at Large*, xl, 15.

miles, and from Lake City to Quincy, one hundred and thirty miles, was completed on time. The remaining one hundred and eighty-one miles were completed much later by the Pensacola and Atlantic company.⁹² There have been certified to the state under this grant 1,308,541 acres.⁹³

Of the line from Amelia Island (Fernandina) to Tampa, the line from Fernandina to Waldo, the junction (one hundred and eighty-four miles), and the branch from Waldo to Cedar Keys, seventy-one miles, were constructed on time.⁹⁴ The remainder of the road was built to Waldo in 1884.⁹⁵ The company has received 430,504 acres and it is estimated that 1,000,000 acres remain unpatented.⁹⁶

The road from Pensacola to the Alabama line was built in 1859 and destroyed during the war. It was rebuilt in 1870.⁹⁷ There have been certified to Florida on account of this road 166,691 acres.⁹⁸

LOUISIANA.

Louisiana received a grant of land for two roads by an act of June 3, 1856.⁹⁹ The road from the Texas line to Shreveport, twenty miles, and from the Mississippi to Monroe, seventy-four miles, was constructed within the time required.¹⁰⁰ The section from Shreveport to Monroe was built in 1884.¹⁰¹ The state has received from the road 462,465 acres.¹

Some eighty miles of the road from New Orleans to the Texas line were built before the war. During the war the road was in the possession of the Federal Government.² In 1870 the grant was declared forfeited,³ and in 1888, 719,189 acres which had been patented for the road were reconveyed to the government.⁴

The other grant, from New Orleans to the Mississippi line, was not accepted by the state and the lands were restored to market July 27, 1857.⁵

⁹² *House Reports*, 1st sess. 49th Cong., no. 2437.

⁹³ Commissioner of the General Land Office, *Report*, 1897, 225.

⁹⁴ *House Reports*, 1st sess. 49th Cong., no. 2437.

⁹⁵ Poor, *Railway Manual*, 1888, 654.

⁹⁶ Commissioner of the General Land Office, *Report*, 1897, 223, 225.

⁹⁷ Poor, *Railway Manual*, 1884, 510.

⁹⁸ Commissioner of the General Land Office, *Report*, 1897, 225.

⁹⁹ "From the Texas line, in the State of Louisiana, west of the town of Greenwood; via Greenwood, Shreveport, and Monroe to a point on the Mississippi river, opposite Vicksburg; and from New Orleans by Opelousas to the State line of Texas; and from New Orleans to the State line, in the direction to [sic] Jackson, Mississippi." *Statutes at Large*, xi, 18.

¹⁰⁰ Donaldson, *Public Domain*, 796.

¹⁰¹ Poor, *Railway Manual*, 1885, 476.

¹ Commissioner of the General Land Office, *Report*, 1897, 226.

² Poor, *Railway Manual*, 1885, 474.

³ *Statutes at Large*, xvi, 277.

⁴ Commissioner of the General Land Office, *Report*, 1897, 226-7.

⁵ Donaldson, *Public Domain*, 796.

MISSOURI.

The second land grant act which passed Congress was one which granted lands to Missouri for roads from Hannibal to St. Joseph and from St. Louis to the western boundary of the state.⁸ This passed the 32nd Congress and was signed June 10, 1852. The lands were granted by the Missouri legislature to the Hannibal and St. Joseph and the Pacific Railroad companies respectively. It was provided that lands remaining unsold ten years after the completion of the roads should be offered at public sale annually until disposed of.⁷

The road from Hannibal to St. Joseph was opened February 29, 1859,⁹ well within the time required. There have been patented to the state under this grant 611,323 acres.⁹ Of these the company had sold in 1880, 512,998 acres for \$4,802,448, an average of \$9.55 an acre.¹⁰ In 1888 the receipts had amounted to \$2,337,317.¹¹ Detailed reports of land sales since 1880 are not obtainable.

In addition to the land grant the state had given the Pacific company \$4,500,000 in bonds. In 1860 the road had been constructed to Rolla, one hundred and thirteen miles. Then the company failed to pay the interest on the bonds which it had received, and in 1866 the road was sold under foreclosure for \$1,300,000. The new company failed to build the road and in 1868 it was again sold, this time for \$300,000. The new company had built the line almost to the state line by 1870 when the Atlantic and Pacific company purchased the road,¹² and built to Vinita, Indian Territory, during the next year.¹³ Congress had meanwhile, by an act of June 5, 1862, extended the time for the completion of the road to June 10, 1872.¹⁴ In 1866 the Atlantic and Pacific company had been incorporated and given a grant of lands for a road from Springfield, Missouri, to the western boundary of the state.¹⁵ The company was allowed to purchase the Pacific road and thus prevent a duplication of the grant, while the amount of the previous grant was deducted from the new grant. The grant as adjusted for the Pacific road thus extended from St. Louis to Springfield, two hundred and forty miles.

Under the grant the government has certified to the state 1,161,284

⁸ *Statutes at Large*, x, 8.

⁷ *Laws of Missouri*, 1852, 10, 15.

⁹ Poor, *Railway Manual*, 1879, 830.

¹⁰ Commissioner of the General Land Office, *Report*, 1897, 226.

¹¹ Donaldson, *Public Domain*, 779.

¹² Railroad Commissioner, *Report*, 1888, 264.

¹³ See *infra*, p. 124.

¹⁴ Poor, *Railway Manual*, 1884, 821.

¹⁵ *Statutes at Large*, xii, 422.

¹⁶ *Ibid.*, xiv, 292.

acres.¹⁶ In 1880 the company had sold 553,873 acres, while its receipts had amounted to \$1,461,855, making an average of \$2.53 an acre.¹⁷ In 1897 the company then owning the land grant (the St. Louis and San Francisco) reported that there had been sold 1,072,803 acres. The amount received for the lands was not given but the net profit during the previous year had been \$25,310.¹⁸

In 1853 a grant was made to Missouri and Arkansas for a railroad from a point opposite the mouth of the Ohio, via Little Rock, to Fulton, with branches to the Mississippi and Fort Smith.¹⁹ By an act of July 28, 1866, the grant was revived and increased, the time for the completion of the road being fixed at July 28, 1876.²⁰ The main line was constructed as the Cairo and Fulton (now the St. Louis, Iron Mountain, and Southern) by 1874.²¹ On account of this grant the states of Missouri and Arkansas have received 1,388,444 acres.²² of which there had been sold by 1880, 264,802 acres for \$1,129,873, an average of \$4.27 per acre.²³ By 1890, 882,578 acres had been sold for \$2,349,521, with \$542,420 due on contracts,²⁴ and in 1897 the company reported that it had sold or lost by contest, 779,639 acres, for which \$3,075,145 had been received, with \$163,742 due on time sales. During 1896 the receipts from the land department were \$65,906 and the expenses \$53,005. The Missouri lands are now held at an average of \$3 an acre and those in Arkansas at an average of \$2.65.²⁵

The branch from Little Rock to Fort Smith was completed in 1876.²⁶ To this company 1,052,082 acres have been patented.²⁷ The report of this company in 1890 showed that 517,591 acres of these lands had been sold for \$1,544,642, with \$395,900 due on contracts.²⁸ But in 1897 the company reported the sale and loss by contest of only 517,642 acres, but receipts amounting to \$2,247,907, with \$180,907 outstanding on contracts. It is evident that both of these reports cannot be right. During the past year the receipts were reported as being \$23,148, with the expenses, \$24,367.²⁹

¹⁶ Commissioner of the General Land Office, *Report*, 1897, 226.

¹⁷ Donaldson, *Public Domain*, 779.

¹⁸ Railroad Commissioner, *Report*, 1897, 142.

¹⁹ *Statutes at Large*, x, 155.

²⁰ *Ibid.*, xiv, 338.

²¹ Poor, *Railway Manual*, 1875-6, 613.

²² Commissioner of the General Land Office, *Report*, 1897, 226.

²³ Donaldson, *Public Domain*, 783.

²⁴ Railroad Commissioner, *Report*, 1891, 193.

²⁵ *Ibid.*, 1897, 145.

²⁶ Donaldson, *Public Domain*, 790-7.

²⁷ Commissioner of the General Land Office, *Report*, 1897, 226.

²⁸ Railroad Commissioner, *Report*, 1890, 180.

²⁹ *Ibid.*, 1897, 145.

The branch to the Mississippi was located to a point opposite Memphis and was finished in 1871.³⁰ Under this grant there have been patented 184,657 acres,³¹ but as the records of the company have nearly all been destroyed, little can be learned concerning the disposal of these lands.³²

July 4, 1856, a grant was made to Arkansas and Missouri for a road from Pilot Knob to Helena.³³ The St. Louis, Iron Mountain, and Southern company built the road from Pilot Knob to Poplar Bluff, Missouri, where it joined the line of the Cairo and Fulton. No further work was done on the line and the road as constructed was not according to the map filed by the company. No particular effort was made to claim the grant and in 1884 it was repealed.³⁴

KANSAS.

The first grant to Kansas was that of March 3, 1863, for various railroads in that state.³⁵ The first of these grants was given to the Leavenworth, Lawrence, and Galveston company and the second to the Atchison, Topeka, and Santa Fé. Of the former only the portion from Lawrence to the southern boundary of the state was built,³⁶ and in 1876 the unearned lands were forfeited.³⁷ There have been patented for the earned portion of the grant 249,446 acres but from this must be deducted 186,936 acres lying within the Osage reservation, leaving only 63,510 acres for the company.³⁸ Yet in 1880 the company was reported as having sold 199,759 acres for \$597,166.³⁹ How this excess has been accounted for I am as yet unable to ascertain.

For the construction of the main line of the other road the Santa Fé company has received 2,944,788 acres.⁴⁰ In 1876 it offered its lands at

³⁰ Poor, *Railway Manual*, 1877-8, 795.

³¹ Commissioner of the General Land Office, *Report*, 1897, 226.

³² Railroad Commissioner, *Report*, 1895, 142.

³³ *Statutes at Large*, xiv, 83.

³⁴ *Ibid.*, xxiii, 61.

³⁵ "First, of a railroad and telegraph from the city of Leavenworth by way of the town of Lawrence, and via the Ohio City crossing of the Osage River, to the Southern line of the State, in the direction of Galveston bay in Texas, with a branch from Lawrence by the valley of the Wakarusa River, to the point on the Atchison, Topeka, and Santa Fé Railroad where said road intersects the Neosho River. Second, of a railroad from the city of Atchison, via Topeka, the capital of said State, to the Western line of the State, in the direction of Fort Union and and Santa Fé, New Mexico, with a branch from where this last-named road crosses the Neosho, down said Neosho valley to the point where the said first-named road enters the said Neosho valley." *Statutes at Large*, xii, 772.

³⁶ *House Reports*, 1st sess. 48th Cong., no. 1113, p. 5.

³⁷ *Statutes at Large*, xix, 101.

³⁸ Commissioner of the General Land Office, *Report*, 1897, 229.

³⁹ Donaldson, *Public Domain*, 779.

⁴⁰ Commissioner of the General Land Office, *Report*, 1897, 230.

prices ranging from \$1.75 to \$9 an acre.⁴¹ Up to 1880 it had sold 993,675 acres and had received for them \$5,802,985.⁴² In 1888 the company reported 1,513,724 acres sold and practically all the rest contracted for. The receipts from the lands had been \$11,601,636, the expenses \$1,644,603, and the taxes \$1,175,724, leaving a net profit of \$7,781,309.⁴³

An act of July 1, 1864, extended the branch road from Emporia north to a point near Fort Riley.⁴⁴ By an act of July 26, 1866, a grant was made for a line from Fort Riley down the valley of the Neosho to the southern line of the state,⁴⁵ thus duplicating the previous grants. On March 9, 1866, the Atchison, Topeka, and Santa Fé company made an agreement with the southern branch of the Union Pacific (afterward the Missouri, Kansas, and Texas) by which the latter assumed all the obligations in regard to the building of the Neosho valley branch. In view of this agreement it was considered that the act of 1866 was an extension of the previous grants and the Missouri, Kansas, and Texas received the grant.⁴⁶ The state has received 974,017 acres on behalf of the company, but of these 270,970 acres must be deducted as part of the Osage Indian reservation.⁴⁷ In 1880 the sales had amounted to 435,554 acres and the receipts to \$1,604,014.⁴⁸ In 1886 there had been received from sales of lands \$2,847,803.⁴⁹

By an act of July 23, 1866, a grant was made to Kansas in aid of the St. Joseph and Denver City Railroad company, which was to build from a point opposite St. Joseph, Missouri, via Maryville to the Union Pacific railroad.⁵⁰ The road as constructed connected with the Burlington and Missouri River railroad but not with the Union Pacific. It was, however, decided that the company had complied with the law in so building, and it received the grant.⁵¹ Under the act 462,733 acres have been patented to the company⁵² but no information can be obtained as to the disposition of the lands.

The Kansas and Neosho Valley company received a grant by an act of July 25, 1866, for a road from Kansas City through the eastern part of the state.⁵³ The road was to be completed within ten years and

⁴¹ *How and Where to Get a Living*, Boston, 1876, 26-7.

⁴² Donaldson, *Public Domain*, 779.

⁴³ Kansas Railroad Commissioners, *6th Annual Report*, 222.

⁴⁴ *Statutes at Large*, xiii, 339.

⁴⁵ *Ibid.*, xiv, 289.

⁴⁶ *Kansas City, etc., Co. v. Attorney General*, 118 U. S., 982.

⁴⁷ Commissioner of the General Land Office, *Report*, 1897, 230-31.

⁴⁸ Donaldson, *Public Domain*, 779.

⁴⁹ Railroad Commissioner, *Report*, 1886, 611.

⁵⁰ *Statutes at Large*, xiv, 210.

⁵¹ *Van Wyck v. Knevals*, 106 U. S., 360.

⁵² Commissioner of the General Land Office, *Report*, 1897, 230.

⁵³ *Statutes at Large*, xiv, 236.

was built to the state line in 1870.⁵⁴ But in 1877 the grant was repealed,⁵⁵ at the request of the company on account of the hostility of the settlers along the road.⁵⁶ The lands were surrendered and restored to entry under the homestead law.⁵⁷

CORPORATIONS.

The act incorporating the Union Pacific Railroad company, approved July 1, 1862, provided for a line from a point on the 100th meridian to San Francisco.⁵⁸ From the eastern terminus four branches were provided, to the eastern boundary of the state of Iowa, to Sioux City, to the mouth of the Kansas river, and to St. Joseph. A grant of five sections of land a mile was made. In 1864 the grant was increased to ten sections per mile. The Central Pacific was to meet the Union Pacific at any point east of California but was to receive lands for only one hundred and fifty miles of that distance. The Kansas City branch could connect with the main line at any point west of the eastern terminus but would receive no more lands than if the road had been built as originally provided for. The Union Pacific company was released from the obligation to construct the Sioux City branch and an extension of the Burlington and Missouri river was provided for.⁵⁹ In 1866 the eastern terminus was changed to Omaha.⁶⁰

The point of meeting of the Union and Central Pacific roads was indefinite and so a race ensued to prolong each road as far as possible. The two roads met at Promontory Point and their completion was celebrated May 10, 1869.⁶¹ A joint resolution of the same year fixed the

⁵⁴ Poor, *Railway Manual*, 1875-6, 732.

⁵⁵ *Statutes at Large*, xix, 404.

⁵⁶ *Record*, 2nd sess. 44th Cong., 1510.

⁵⁷ Commissioner of the General Land Office, *Report*, 1878, 458.

⁵⁸ "The line of said railroad and telegraph shall commence at a point on the one hundredth meridian of longitude west from Greenwich, between the south margin of the valley of the Republican River and the north margin of the valley of the Platte River, in the Territory of Nebraska at a point to be fixed by the President of the United States, after actual surveys; thence running westerly upon the most direct, central, and practicable route, through the territories of the United States, to the western boundary of the Territory of Nevada, there to meet and connect with the line of the Central Pacific Railroad company of California

" The Central Pacific Railroad company of California, a corporation existing under the laws of the State of California, are [sic] hereby authorized to construct a railroad and telegraph line from the Pacific coast, at or near San Francisco, or the navigable waters of the Sacramento River, to the eastern boundary of California." *Statutes at Large*, xii, 493-4.

⁵⁹ *Ibid.*, xiii, 356.

⁶⁰ *Ibid.*, xiv, 79.

⁶¹ Davis, *Union Pacific Railway*, 152.

junction at or near Ogden.⁶² The Union Pacific has received 6,806,497 acres under the act of 1864 and it is estimated that 517,286 acres are still due it.⁶³ In 1875 it offered its lands for from \$2 to \$10 an acre.⁶⁴ Up to 1880 the company had sold 1,568,438 acres for \$6,916,811, an average of \$4.41 an acre. These sales had been made in tracts averaging about 100 acres to each purchaser.⁶⁵

After 1880 the report of the Union Pacific lands sales includes the Kansas Pacific and Denver Pacific grants. In 1886 the company had received 3,856,835 acres and sold 12,260,163 acres for \$21,667,734, with \$13,986,939 outstanding. The sales had been at an average of \$2.54 for the Union Pacific, \$3.61 for the Kansas Pacific and \$4.37 for the Denver Pacific.⁶⁶ Up to 1897, 10,380,066 acres had been patented to the company, while it had sold 14,287,517 acres for \$38,602,141, with \$5,917,843 still due. These sales were at an average of \$2.49 for the Union Pacific, \$4.21 for the Kansas Pacific and \$4.21 for the Denver Pacific. The land grant department of the company is now operated at a loss, the expenses for the year 1897 exceeding the receipts by \$65,241. On the Union Pacific proper there was a surplus of \$21,553, but this was more than overcome by the deficits of the other divisions. The company now asks an average of 65 cents for its Union Pacific lands and \$2.61 for its Kansas and Denver lands.⁶⁷

In 1897 the secretary of the interior directed the commissioner of the land office to suspend the issuance of patents to the bond-aided railroads for lands not actually sold to bona fide purchasers before these companies defaulted on their indebtedness to the government. The secretary fixed the date of such default at November 1, 1895, for the Kansas Pacific and January 1, 1897, for the Union Pacific.⁶⁸

The Central Pacific, as related, met the Union Pacific at Promontory Point in 1869. On account of the road, as patented, the company has received 2,648,433 acres, with 2,580,723 unpatented.⁶⁹ In 1880 it had sold 295,886 acres for \$1,114,999, an average of \$3.77 an acre.⁷⁰ The company consolidated with the Western Pacific, and California and Oregon, both land-grant roads. Up to 1886 of the lands of these roads 1,891,571 acres had been sold for \$7,117,886,⁷¹ and to 1897, 3,144,336 acres for \$10,189,635.

⁶² *Statutes at Large*, xvi, 56.

⁶³ Commissioner of the General Land Office, *Report*, 1897, 230, 224.

⁶⁴ *Guide to the Union Pacific Railroad Lands*, Omaha, 1875, p. 26.

⁶⁵ Donaldson, *Public Domain*, 916-17.

⁶⁶ Railroad Commissioner, *Report*, 1886, 562.

⁶⁷ *Ibid.*, 1897, 75.

⁶⁸ *Ibid.*, 74.

⁶⁹ Commissioner of the General Land Office, *Report*, 1897, 230, 224.

⁷⁰ Donaldson, *Public Domain*, 920.

⁷¹ Railroad Commissioner, *Report*, 1886, 581.

with \$825,876 outstanding. The average price now asked is \$3 an acre.⁷² As in the case of the Union Pacific, in accordance with the order of the secretary of the interior in 1897, the issuance of patents for this road has been suspended. The date of default on the indebtedness has been fixed at January 1, 1896, for the Central Pacific and January 1, 1897, for the Western Pacific.⁷³

The Western Pacific built that portion of the road west from Sacramento. Before consolidating with the Central Pacific it received 424,727 acres, all of which it sold before consolidation.⁷⁴

The California and Oregon Railroad company was to build from the Central Pacific to the Oregon line. By an extension of time it had until July 1, 1880, to complete the road. The portion from the Central railroad to Redding was built on time,⁷⁵ and the road finished to the state line during 1886.⁷⁶ Up to 1880 the company had received 1,338,039 acres and sold 366,622 acres for \$2,970,365, an average of \$8.95 an acre.⁷⁷ There have been patented on account of the road 2,968,698 acres.⁷⁸

The Kansas Pacific, having the right to join the Union Pacific at any point it wished, west of the one-hundredth meridian, built to Denver and then north, joining the Union Pacific at Cheyenne.⁷⁹ In 1880 the company had received 828,830 acres and sold 1,291,454 acres for \$4,419,960, an average of \$3.42 an acre.⁸⁰ The total number of acres patented on account of the grant is 3,170,184 acres and 4,120,901 acres have been disposed of for \$13,487,437, with \$2,851,567 outstanding on time sales. No more lands will be patented to the company except those sold to actual purchasers before November 1, 1895.⁸¹

The Denver Pacific received the grant for that portion of the road between Denver and Cheyenne. By 1880, 49,811 acres had been patented to the company and 160,731 acres sold for \$731,881, an average of \$4.44 an acre.⁸² In 1897 there had been 403,256 acres patented and 582,722 sold, the receipts amounting to \$2,219,799, with \$439,114 outstanding.⁸³

The extension of the Hannibal and St. Joseph was known as the Central Branch of the Union Pacific. This received a grant for 100 miles of road of which there had been patented up to 1880, 187,608 acres.

⁷² Ibid., 1897, 86.

⁷³ Ibid.

⁷⁴ Donaldson, *Public Domain*, 920.

⁷⁵ Donaldson, *Public Domain*, 806.

⁷⁶ Poor, *Railway Manual*, 1888, 937.

⁷⁷ Donaldson, *Public Domain*, 920.

⁷⁸ Railroad Commissioner, *Report*, 1897, 86.

⁷⁹ Davis, *Union Pacific Railway*, 108n.

⁸⁰ Donaldson, *Public Domain*, 918.

⁸¹ Railroad Commissioner, *Report*, 1897, 75, 74.

⁸² Donaldson, *Public Domain*, 919.

⁸³ Railroad Commissioner, *Report*, 1897, 75.

The company had sold about 170,000 acres on an average of \$5 an acre.⁸⁴ In 1897 there had been patented to the company 219,531 acres. No report was made on the amount sold or the price obtained for its lands. During the previous year the receipts were \$676 and the expenses \$51. The secretary of the interior has suspended the issuance of patents except for lands sold to bona fide purchasers before the default of the company on its indebtedness to the government, January 1, 1896.⁸⁵

The branch from Sioux City was built by the Sioux City and Pacific company in 1869. The company received 41,318 acres which it sold April 15, 1875, to the Missouri Valley Land company for \$200,000.⁸⁶

Under the act of July 25, 1866,⁸⁷ that portion of the line from the Central Pacific to Portland was to be disposed of by the legislature of that state. This conferred the grant upon the Oregon Central company which built from Portland to Roseburg, one hundred and ninety-seven miles, on time.⁸⁸ The remainder of the road was completed in December, 1887.⁸⁹ An act of January 31, 1885, forfeited the lands opposite to all portions of the road not then completed, i. e., from Roseburg to the state line.⁹⁰ The road has received 2,287,131 acres and it is estimated that 227,992 acres remain unpatented.⁹¹ Up to 1880 it had sold 82,072 acres for \$175,650.⁹² By 1886 237,773 acres had been sold for \$384,389, with \$385,647 due on time sales.⁹³ In 1897 the sales had amounted to \$382,443 acres for \$1,020,329, with \$775,881 outstanding. During the previous year the receipts had amounted to \$33,724, and the expenses \$60,012. The average price now asked for the lands is \$3.00.⁹⁴

The amendatory act of 1864 had also provided for an extension of the Burlington and Missouri River road through Nebraska to connect with the Union Pacific not further west than the 100th meridian. In 1870 the point of connection with the Union Pacific was changed to at or near Fort Kearney.⁹⁵ The road was opened for traffic September 2, 1872.⁹⁶ There have been received on account of the grant 2,374,090 acres. By December 31, 1879, there had been sold 1,574,392 acres for

⁸⁴ Donaldson, *Public Domain*, 921.

⁸⁵ Railroad Commissioner, *Report*, 1897, 97.

⁸⁶ Donaldson, *Public Domain*, 922, 778.

⁸⁷ *Statutes at Large*, xlv, 239.

⁸⁸ Donaldson, *Public Domain*, 807.

⁸⁹ Poor, *Railway Manual*, 1888, 914.

⁹⁰ *Statutes at Large*, xxiii, 296.

⁹¹ Commissioner of the General Land Office, *Report*, 1897, 232, 223.

⁹² Donaldson, *Public Domain*, 779.

⁹³ Railroad Commissioner, *Report*, 1886, 596.

⁹⁴ *Ibid.*, 1897, 137.

⁹⁵ *Statutes at Large*, xvi, 118.

⁹⁶ Donaldson, *Public Domain*, 922.

⁹⁷ Commissioner of the General Land Office, *Report*, 1897, 231.

\$8,556,782.⁹⁸ In 1880 the road consolidated with the Burlington and Missouri River company as the Chicago, Burlington, and Quincy. In 1886 the new company had disposed of 2,673,345 acres under both grants for \$15,725,314.⁹⁹ In 1897 there had been sold 2,374,501 acres, the receipts amounting to \$11,201,463, with \$305,674 outstanding on time sales. During the previous year the receipts were \$75,035, and the expenses \$29,136. The remaining lands are held at an average of \$4.00 an acre.¹⁰⁰

July 13, 1866, a grant was made to the Placerville and Sacramento Valley railroad company for a road from Folsom to Placerville, California.¹⁰¹ This grant was forfeited in 1874,¹ and no lands have been patented on account of it.

A grant for a road from Stockton to Copperopolis, California, which was made by an act of March 2, 1867,² was also forfeited in 1874.³ No lands have been patented to this road.

The grant for a road to the Pacific by the northern route was made July 2, 1864, to the Northern Pacific Railroad company, which was to build from a point on Lake Superior to a point on Puget's Sound, with a branch to Portland, via the valley of the Columbia. The grant amounted to ten sections per mile in the states and twenty sections in the territories, and the road was to be completed by July 4, 1876.⁴ In 1866 the time for building the road was extended two years,⁵ and in 1868 the original act was amended so as to fix the time at July 4, 1877.⁶ It was, however, held that the effect of these provisions was to make the final limit July 4, 1879, the act of 1866 being considered as amendatory of the act of 1868.⁷ Within the time required there were constructed 531 miles of road, leaving 1,739 miles to be built.⁸ In 1883 the through line from Ashland to Portland was opened,⁹ but as the branch between Wallula and Portland had been built by another company it was forfeited by the act of 1890.¹⁰

Up to 1880 there had been patented to the company 746,509 acres, while it had sold 2,593,983 acres for \$9,089,453.¹¹ By 1886 11,459,836 acres

⁹⁸ Poor, *Railway Manual*, 1880, 924.

⁹⁹ Railroad Commissioner, *Report*, 1886, 603.

¹⁰⁰ *Ibid.*, 1897, 111.

¹⁰¹ *Statutes at Large*, xiv, 94.

¹ *Ibid.*, xviii, 29.

² *Statutes at Large*, xiv, 548.

³ *Ibid.*, xviii, 72.

⁴ *Ibid.*, xiii, 365.

⁵ *Ibid.*, xiv, 355.

⁶ *Ibid.*, xv, 255.

⁷ Commissioner of the General Land Office, *Report*, 1879, 109-111.

⁸ *House Reports*, 1st sess. 48th Cong., no. 1256, p. 3.

⁹ Railroad Commissioner, *Report*, 1897, 131.

¹⁰ Commissioner of the General Land Office, *Report*; 1891, 39.

¹¹ Donaldson, *Public Domain*, 779.

had been patented and 5,830,871 sold for \$20,856,000, with \$3,676,204 due on time sales.¹² In 1895 8,466,250 acres had been sold by the company for \$34,273,375, with \$4,280,438 still due. The average price had been \$3.92 an acre.¹³ In the balance sheet of the company for 1898 the net proceeds of the land department were given as \$3,624,712.¹⁴

An act of July 27, 1866, chartered the Atlantic and Pacific Railroad company, which was to build from Springfield, Missouri, to the Pacific coast by the southern route.¹⁵ As allowed by the charter the company purchased the South Pacific road, which had received a grant over the same route as far as the southern boundary of Missouri.¹⁶ The road was to be constructed by July 4, 1878. By that date the line had been built from Springfield to Vinita, Indian Territory.¹⁷ In 1886 the lands opposite the uncompleted portions of the road were declared forfeited.¹⁸ By that time the road had been extended to Sapulpa (76 miles) by the St. Louis and San Francisco company, and from near Albuquerque, N. M., to the Colorado river (559 miles) by the Atchison, Topeka, and Santa Fé company.¹⁹ According to the report of the land office there have been patented to the company 1,222,012 acres, and it was estimated that 3,476,041 acres were still due.²⁰ But according to the report of the railroad commissioner 708,723 acres only have been patented.²¹ Of these 220,259 acres had been sold in 1880 for \$623,369,²² while by 1897 all of the lands which the company reported as having received, 708,523 acres, were reported as sold. The total receipts from land sales had been \$3,940,483, but during the previous year the receipts had only been \$92.03, while the expenses were \$13,462.12.²³

Section 18 of the Atlantic and Pacific act authorized a connection with the Southern Pacific road of California and made a similar grant to that road.²⁴ Within the time required by the granting act there were built the sections of the road between San Jose and Tres Pinos, 50 miles, and between Huron and Mojave, 182 miles.²⁵ The line was afterward built from Mojave to the state line, and from Huron to

¹² Railroad Commissioner, *Report*, 1886, 595.

¹³ *Ibid.*, 1895, 151.

¹⁴ Northern Pacific Railway Company, *Report*, 1898, 31.

¹⁵ *Statutes at Large*, xiv, 292.

¹⁶ *Supra*, p. 115.

¹⁷ Donaldson, *Public Domain*, 807.

¹⁸ *Statutes at Large*, xxiv, 123.

¹⁹ Poor, *Railway Manual*, 1888, 744-5.

²⁰ Commissioner of the General Land Office, *Report*, 1897, 232, 228.

²¹ Railroad Commissioner, *Report*, 1897, 105.

²² Donaldson, *Public Domain*, 779.

²³ Railroad Commissioner, *Report*, 1897, 105.

²⁴ *Statutes at Large*, xiv, 299.

²⁵ Donaldson, *Public Domain*, 808.

Aclade. In 1890 the lands along the portion between Tres Pinos and Aclade were forfeited.²⁹ The grant to the Texas Pacific also authorized the Southern Pacific company to connect with the Texas Pacific at the Colorado river.²⁷ This road was completed January 23, 1878.²⁸ On account of this grant the company has received 2,672,753 acres.²⁹ In 1880 it had sold 279,623 acres for \$1,999,396.³⁰ By 1886 there had been sold 961,950 acres for \$3,467,681, with \$2,472,541 due on time sales.³¹ In 1897 the company reported that it had received 3,186,301 acres, of which 3,544,970 acres had been disposed of. The total receipts from the lands had been \$9,167,290, while \$3,234,006 were due on time sales. The receipts of the land department during the year were \$73,773 and the expenses \$30,326.³²

The Texas and Pacific grant was made March 3, 1871, and provided for a road from Marshall, Texas, to San Diego, California, via El Paso and the Colorado river, which was to be crossed near the southern boundary of California. The road was to be built within ten years,³³ which time was extended to May 2, 1882. As there were no United States lands in Texas the grant only began at El Paso, and the company had not built to that point when the time for the completion of the road expired. This was due, however, to the fact that the Southern Pacific company had built east from Yuma to El Paso, without the authorization of Congress. The Texas Pacific released its rights under the land grant to the Southern Pacific, but in 1885 the entire grant was forfeited.³⁴

Section 23 of the act granting lands to the Texas Pacific provided for a grant to the New Orleans, Baton Rouge, and Vicksburg company for a road from New Orleans, via Baton Rouge and Alexandria, to connect with the Texas Pacific. The road was to be constructed by March 3, 1876. The company located its line from New Orleans to Baton Rouge on the east side of the Mississippi, and thence via Alexandria and Shreveport to the Texas line. No portion of the road was constructed by the company, and in 1880 it assigned to the New Orleans Pacific, a company which was building a line from Texas to Baton Rouge over the same route as the other company, but which had built

²⁹ Commissioner of the General Land Office, *Report*, 1891, 39.

²⁸ Donaldson, *Public Domain*, 929.

²⁷ *Ibid.*, 1897, 232.

²⁶ *Statutes at Large*, xvi, 579.

²⁵ Donaldson, *Public Domain*, 779.

²⁴ Railroad Commissioner, *Report*, 1886, 621.

²³ *Ibid.*, 1897, 152.

²² *Statutes at Large*, xvi, 573.

²¹ *Ibid.*, xxiii, 337.

from Baton Rouge to Vicksburg along the west bank of the Mississippi.²⁵

An act of February 8, 1887, forfeited the grant on the east side of the river and the lands opposite to portions of the road then unconstructed by the New Orleans Pacific prior to January 5, 1881, the date of the conveyance from the New Orleans, Baton Rouge, and Vicksburg.²⁶

The company has received 980,587 acres under the grant, while 109,137 acres remain unpatented.²⁷ In 1886 the company stated that no sales had been made. Since then the company has failed to make reports on its land grant.

²⁵ Donaldson, *Public Domain*, 837-8.

²⁶ *Statutes at Large*, xxiv, 891.

²⁷ Commissioner of the General Land Office, *Report*, 1897, 232, 223.

APPENDIX B.

BIBLIOGRAPHY.

Sources.

The chief source for the history of land-grant legislation, is the report of debates in Congress, published as the *Congressional Globe* from 1833 to 1873, and as the *Congressional Record* from 1873 to the present time. For an outline of the proceedings without the discussion, the *House Journal* and *Senate Journal* are usually more accurate and have been used in case of differences in the reports. In connection with the debates in Congress, I have consulted many documents, such as committee reports, etc., which appear as *Reports of Committees* (House), *House Reports*, *Senate Reports*, *House Executive Documents*, *House Miscellaneous Documents*, *House Documents*, *Senate Executive Documents*, *Senate Miscellaneous Documents*, and *Senate Documents*. The most important public documents relating to the public domain are collected in a publication edited by Thomas Donaldson, *The Public Domain*, Washington, 1884. Reference has been made to the documents reprinted there rather than to the original reports themselves, as they seem to be substantially accurate. Messages and proclamations of the presidents often relate to land grants and can be found in the collection edited by James D. Richardson, *Compilation of the Messages of the Presidents*, 1789-1897, 10 vols., Washington, 1896-99.

All the laws are published in the *Statutes at Large*, to which reference has been made. The land laws have been collected in two sets, one containing those of a general and permanent character in one volume, and the other those of a local and temporary character in two volumes. (*H. R. Mis.*, Doc. 45, parts 1, 2, and 3, 47th Cong., 2d session). Land grant acts are in the latter collection, arranged chronologically under the different states.

For Appendix A, a wide range of sources has been used. Poor's *Manual of the Railroads of the United States* has been of great service. Decisions of the Supreme Court of the United States and of the various state courts often give the history of roads receiving grants. When the matter came before Congress the reports of the Senate and House committees are of great value. Various local and railroad histories have

been used, care being taken in each case to test their accuracy. The reports of the Auditor of Railway Accounts, later the Railroad Commissioner, contain reports of the operations of the land departments of many of the land-grant roads. Of course the only sources for the statistics of land sales are the accounts kept by the companies, and all estimates are based on the reports concerning their land to boards and commissioners. The danger of inaccuracy is increased the further the report used is from these original sources.

Secondary Works.

No study of the history of railroad land grants had as yet appeared.¹ General histories have neglected the subject and little is given in the general accounts of the public domain. Of these general accounts the best is that of Sato, *History of the Land Question in the United States*, in the *Johns Hopkins University Studies in Historical and Political Science* for 1886. The article by Worthington C. Ford, *Public Lands of the United States*, in Lalor, *Cyclopaedia*, volume III, is good and brief. The historical part of Donaldson's *Public Domain* must be used with caution, but, on some points, is the only available account.

Very few histories of railroads in the various states have been published. Mention may be made of Cary, *Organization and History of the Chicago, Milwaukee, and St. Paul Railroad Company* [Milwaukee, 1893]; and B. H. Meyer, *History of Early Railroad Legislation in Wisconsin*, Wisconsin Historical Collections, Vol. XIV, 206-300, and *Early General Railway Legislation in Wisconsin, 1853-1874*, *Transactions Wisconsin Academy of Sciences, Arts and Letters*, Vol. VII, Part I, 337-338.

Histories of the Pacific roads have appeared, of which the best are Davis, *The Union Pacific Railway*, and White, *History of the Union Pacific Railway*, *Economic Studies of the University of Chicago*, No. 2. H. H. Bancroft, in his *History of California*, volume VII, has an excellent chapter on the various projects advanced for the road.

The administrative and legal side of the grants have been treated in books on railway law. The best of these, as far as this feature is concerned, is that of B. K. and W. F. Elliott, *Treatise on the Law of Railroads*. 4 vols., Indianapolis and Kansas City, 1897. Rorer, *Treatise on the Law of Railways*, 2 vols., Chicago, 1884, give a less complete account.

It has not seemed advisable to repeat here the references to general secondary authorities cited in the notes. Outside of the public records

¹ A summary of the present monograph was given in a paper read before the Wisconsin Academy of Sciences, Arts, and Letters and published in its *Transactions*, Vol. XII, Part I, 306-16.

and periodical literature there is little relating to grants of lands for railroads. On the passage of the Illinois Central bill there is an account coming indirectly from Douglas, published in Cutts, *Brief Treatise on Constitutional and Party Questions*,² which is so inaccurate that I have rejected it altogether. As this has commonly been received as authoritative, a few of its mistakes will be pointed out. The statement is made by Douglas that between the sessions of the thirtieth and thirty-first Congresses he made an agreement with the directors of the Mobile and Ohio road by which he was to incorporate a grant to that road in the Illinois Central bill, and in return the legislatures of Alabama and Mississippi would instruct their Senators and Representatives, who had before opposed the Illinois Central grant, to support the bill. Douglas said: "The bill, when first introduced, had been opposed by the Senators from Mississippi, Davis and Foote, on the ground 'of its unconstitutionality, and also by the Senators from Alabama, King and Clement, and by the members of the House from those states.'" As a matter of fact, on the question of the third reading of the bill, Davis and Foote voted in favor of it, and the Senators from Alabama, Bagby and Lewis (not King and Clement), voted against it.³ On a similar question in the House three of the Alabama delegation voted against the bill and four did not vote, while of the Representatives from Mississippi two voted for and one against the bill and one did not vote.⁴ Nor do the laws of Mississippi and Alabama contain any resolution instructing a vote in favor of the grant.

The account given by Douglas of the final consideration of the bill in the House is as follows: "When the bill stood at the head of the calendar in the House, Mr. Harris, of Illinois, moved to clear the Speaker's table, and the motion was carried. We had counted up and had fifteen majority for the bill pledged to support it. * * * The House proceeded to clear the Speaker's table, and the clerk announced 'A bill granting lands to the state of Illinois,' etc. A motion was immediately made by the opposition, which brought on a vote, and we found ourselves in a minority of one. * * * Harris, quick as thought, pale and white as a sheet, jumped to his feet and moved that the House go into committee of the whole on the slavery question. There were fifty members ready with speeches on this subject, and the motion was carried." What really happened on July 31 was as follows: Inge, of Alabama, (not Harris), moved to proceed to the business on the Speaker's table. The Illinois bill came up and Richardson, of Illinois, moved the

²For a reprint of this see Donaldson, *Public Domain*, 262-4.

³*Globe*, 1st sess. 30th Cong., 723.

⁴*House Journal*, 1st sess. 30th Cong., 1270.

previous question, and Jones, of Tennessee, moved to lay the bill on the table. Duer, of Connecticut, (not Harris), moved to go into committee of the whole, which was carried by a vote of 102 to 71.² No other vote had been taken.

Douglas then explains how the bill was reached again after it had gone to the foot of the calendar by the vote to go into committee of the whole. "It occurred to me that the same course pursued with other bills would place them, each in turn, at the foot of the calendar, and thus bring the Illinois bill at the head. * * * The motion to clear the table, and go into committee of the whole on the slavery question, would each have to be made ninety-seven times, and while the first motion might be made by some of our friends, or the friends of other bills, it would not do for us, or any one known to be a warm friend or connected with us to make the second motion, as it would defeat the other bills and alienate from us the support of their friends. I thought a long while and finally fixed on Mr. ———, who, though bitterly opposed to me (politically), yet I knew to be my personal friend. Living up in——, he supported the bill, but did not care much one way or the other whether it passed or not, voted for it but was lukewarm." So an arrangement was made with Mr. ——— by which he made the necessary motion to go into committee of the whole, and thus forced the bill to the head of the calendar. But between July 31 and September 17, when the bill was passed, the only person who could correspond to Douglas' statement made such a motion seventeen times. This was Bagly, of Virginia, who was not opposed to Douglas politically and did not vote in favor of the bill. No one else made the motion with any frequency.

The fact that these accounts are based on conversations with Douglas, some nine years after the occurrences, and not written out in their final form by Cutts until much later would also tend to discredit their accuracy. Douglas probably gave the facts as well as he would recollect them, but the lapse of time was too great for anything approaching exactness.

²*House Journal*, 1st sess. 31st Cong., 1490.



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ENGLISH COMMON LAW IN THE EARLY AMERICAN
COLONIES

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THE ENGLISH COMMON LAW IN THE EARLY AMERICAN COLONIES.

INTRODUCTION.

When American legal history comes to be studied more thoroughly, it will perhaps be found that no country presents, in the short space of three centuries, such a variety of interesting phenomena. An old nation, marked for a sturdy sense of right, sends colonies into a wilderness; they form rude institutions, often suggesting early European experience, to govern their simple social relations. As society grows more intricate, more highly organized, the legal institutions of the mother country are gradually received and applied, until a large portion of the common law is transferred to the actual practice of the colonies. Their law, however, always retains the impress of the earlier originality, when new conditions brought forth new institutions and new legal ideas. The struggles with the mother country tend to cause a wide spread of legal knowledge, and the common law is revered as a muniment of personal liberties. Blackstone is outdone by American lawyers in extravagant panegyrics. It is only when the rationalizing tendencies of French democracy become triumphant in America, that the value of the common law is openly and bitterly attacked. Then comes the great reforming and codifying movement of this century, in which New York is the leading state. Unconscious development of custom, reversal to simpler forms, adaptation and modification of a technical system brought from abroad, conscious reform, and, finally, the effort to cast all legal relations into a simple and lucid system,—all these phenomena can be traced

in our law, and nowhere can the interaction of popular consciousness of right with legal institutions be more fully and clearly ascertained.

The first question that confronts the investigator concerns the influence upon our system of the English common law, that complex body of principles and rules, contained, at the early colonial period, in the Year Books, Reports, and the standard law treatises of quasi-judicial authority. Statutory law-making had been but sparingly used up to this time in England, and the law of property and personal security, criminal law, and procedure, found their norms in a long series of judicial precedents. The transfer of this system to the colonies, its amalgamation with new forms there originated, its adaptation to novel conditions, constitutes a subject of rare interest.

The accepted legal theory of this transfer is well known. It is clearly stated by Story in *Van Ness v. Packard*, 2 Peters, 144: "The common law of England is not to be taken in all respects to be that of America. Our ancestors brought with them its general principles, and claimed it as their birth-right; but they brought with them and adopted only that portion which was applicable to their condition." This theory is universally adopted by our courts, and it has given them the important power of judging of the applicability of the principles of the common law to American conditions. According to this view, the common law was from the first looked upon by the colonists as a system of positive and subsidiary law, applying where not replaced by colonial enactments or by special custom suited to new conditions.

While this legal theory is adopted as an eminently satisfactory explanation of the jurisprudence of today, it is not complete enough to afford an adequate synthesis of colonial legal facts for the historian. It contains, of course, the great truth that men cannot all at once cut themselves loose from a system of thought or action under which they have lived; that, though they transfer themselves entirely to new conditions, their no-

tions and institutions must necessarily be circumstanced and colored by their former experience. Thus, of course, the more simple, popular, general parts of the English common law were from the first of great influence on colonial legal relations. This is, however, very far from declaring the common law of England a subsidiary system in actual force from the beginning of colonization. On the contrary, we find from the very first, originality in legal conceptions, departing widely from the most settled theories of the common law, and even a total denial of the subsidiary character of English jurisprudence. The first problem to be determined is therefore this: What was the attitude of the earliest colonists towards the common law as a subsidiary system? To the solution of this question this thesis addresses itself.

The earliest settlers in many of the colonies made bodies of law, which, from every indication, they considered a complete statement of the needful legal regulations. Their civilization being primitive, a brief code concerning crimes, torts, and the simplest contracts, in many ways like the dooms of the Anglo-Saxon kings, would be sufficient. Not only did these codes innovate upon, and depart from the models of common law, but, in matters not fixed by such codes, there was in the earliest times no reference to that system. They were left to the discretion of the magistrates.

In many cases the colonists expressed an adhesion to the common law, but, when we investigate the actual administration of justice, we find that usually it was of a rude, popular, summary kind, in which the refined distinctions, the artificial developments of the older system have no place. A technical system can, of course, be administered only with the aid of trained lawyers. And these were generally not found in the colonies during the 17th century, and even far down into the 18th we shall find that the legal administration was in the hands of laymen in many of the provinces. Only as the lawyers grow more numerous and receive a better training do we find a general re-

the more refined theories of the common law. It is natural that with increased training the courts and the great reservoir of legal experience turned to the great reservoir of legal experience for guidance and information; the courts and the great reservoir of legal experience favor the theory of the adoption of the common law. The forefathers of the colonies. The forefathers of New England, where the common law was plainly denied; the common law (Volksrecht) grew up; and, the place of a secondary system.

We also note a clear reversion to an earlier stage in the common law again passing through the very experience of the English fore-fathers in developing their legal system. As examples of this we might mention the union of the courts; the petitioning against the exercise of jurisdiction by the council in ordinary cases, which dates back to the time of Edward III; archaic concepts; the system of petty popular courts which were obsolete, or only maintained a precarious existence in England.

The theory of the transfer has its established place in jurisprudence; but, historically, it should be modified to bring out the fact that we had a period of rude, untechnical law, followed, as lawyers became numerous and the study of law prominent, by the gradual reception of most of the rules of the English common law. In this way only can we understand, from the first, the very characteristic and striking departures from older legal ideas which are found in the New World; while, at the same time, its full importance is assigned to the influence of English jurisprudence in moulding our legal thought. The theory of the courts is an incomplete, one-sided statement needing historical modification. When the courts come to analyze the nature of the law actually brought over by the colonists they find it a method of reason-

ing,¹ "a system of legal logic, rather than a code of rules;" the rule, "live honestly, hurt nobody, and render to every man his due."² Such a very indefinite conception of the matter is without value historically; on the basis of this indefinite notion there has been claimed for the courts an almost unlimited power, under the guise of selecting the applicable principles of the common law, of fixing really new and unprecedented rules and, by their adjudications, legislating in the fullest sense of the word. On the other hand, a historical study will reveal a most interesting organic growth, and, after the records have been more fully published, no system will offer more of interest to inquiring students than that developed on American soil. The study of the documents reveals great diversities in the early systems of colonial laws. Then with the growth of national feeling there comes also a growth of unification of legal principles, for which the English common law affords the ideal or criterion. And, though during the decade immediately preceding Independence, the English common law was generally praised and apparently most readily received by the larger part of American courts, still the marks of the old popular law remain strong and most of the original departures in American jurisprudence can be traced back to the earliest times.

The object of this thesis is to present the attitude of the colonists during the 17th century, and in some cases during the 18th, towards the common law of England. The manner of treatment will be by colonies; the purpose is to discuss first the colonies of New England in which the departure from common law ideas is most clearly marked, followed by the Middle and Southern colonies, many of which adhered more closely to the Old World model.

Neither does the scope of this thesis include, nor the extent of the hitherto published sources permit, a complete presentation of the varying systems of private law in use in the colo-

¹Morgan vs. King, 30 Barbour, 13.

²Marks vs. Morris, 4 Hening and Mumford, 463.

nies. Very few of the colonial court records have been published; in some cases, as in Virginia after the Richmond fire of 1865, most of them are unhappily lost forever. A publication of characteristic records of this kind is a desideratum not only for legal history, but for the study of the general economic and social development. However, sufficient material is extant in accessible form to show the general attitude of the colonists and colonial courts towards the common law as a technical system, and it is this only on which the thesis hopes to throw some light.

CHAPTER I.

NEW ENGLAND.

Massachusetts.

The ideas of the Massachusetts colonists on the matter of law appear very clearly from a resolve of the general court¹ of the year 1636. The government is there entreated to make a draft of laws "agreeable to the word of God" to be the fundamental laws of the commonwealth. This draft is to be presented to the next general court. In the meantime, the magistrates are to proceed in the courts to determine all causes according to the laws then established (the early laws of the general court), and where there is no law "then as near the law of God as they can." The council is also empowered to make orders for the general conduct of business which is not yet covered by any law, and herein to apply its best discretion according to the rule of God's word. There is here absolutely no reference to the common law of England. As a subsidiary law the word of God is appealed to, as interpreted by the best discretion of the magistrates. This led to the administration of a rude equity, according to the idea of justice held by the magistrate, influenced by popular ideas and customs. With a homogeneous population holding the same general views on morals and polity, a true popular system of law could thus be produced, unrefined by juristic reasonings, untrammelled by technical precedents, satisfying, in general, the sense of right in the community. Should, however, alien elements intrude, they would find such a system exceedingly uncongenial and oppressive.

We find that in the early years of the colony the magistrates

¹ *Massachusetts Colonial Records*, I, 174.

and persons in authority were intensely reluctant to have any written laws made, because by these their discretion would be restrained. The reason assigned by Winthrop² for this reluctance was the desire to have laws grow up by custom, so as to have them adapted to the nature and disposition of the people, which could not be sufficiently known to the magistrates properly to legislate for them. A second reason was that the charter provided that the colonists should make no laws repugnant to the laws of England. This they held to refer to positive legislation. The growth of law by custom, though the product might be radically opposed to English principles, they believed no infringement of the charter. Notwithstanding these reasons of the magistrates, the general court insisted upon having a comprehensive body of laws made. The controversy had none of the acrimony of the similar struggle for written laws in Rome before the Twelve Tables; but we can note the same principles at work; the magistracy, in whose discretion the administration of the laws has so far been founded, are reluctant to give up a part of this power, and therefore resist a codification of law. The outcome of this agitation was the passage of the celebrated Body of Liberties,³ in 1641. To evade one of the objections noted by the magistrates, this code was not really enacted as law, but the general court did "with one consent fully authorize and earnestly entreat all that are and shall be in authority to consider them as laws." The laws had been prepared by Nathaniel Ward, a minister with some legal training. They had been revised by the general court and sent into every town for further consideration. Upon the suggestions thus gathered they were again revised and then established as above mentioned. A more careful process of legislation is perhaps nowhere recorded. The laws may therefore be looked upon as a full expression of the popular sense of what the legal relations in the colony should be.

² John Winthrop's *History of New England*, 322.

³ Winthrop's *Journal*, Ed. 1790, p. 237.

Ward, in a letter to Governor Winthrop,⁴ December 22, 1639, questions the advisability of submitting the laws to the different towns for consideration by the freemen thereof, and fears that the spirits of the people might rise too high. They should not be denied their proper and lawful liberties, but he questions "whether it be of God to interest the inferior sort in that which should be reserved '*inter optimates penes quos est sancire leges.*' "

Turning now to the Body of Liberties itself, we find that the doctrine stated in 1636 is again announced, that no man's life shall be taken away unless by virtue of some express law established by the general court, or, in case of the defect of the law in any particular case, by the word of God.⁵ This provision re-enacts the rule of the Massachusetts fundamentals.⁶ "In all criminal offenses where the law hath prescribed no certain penalty, the judges have power to inflict penalties according to the rule of God's word."

The provisions of the Body of Liberties also show the theocratic nature of the Puritan colony. It contains, moreover, many provisions originated by the colonists in response to their special needs. The criminal law is founded on the code of Moses, though the breaking of the Sabbath and the striking of parents are not made capital offenses. In the laws of 1658, however, the latter offense, as well as rebellious conduct against parents is made capital.⁷ The law of inheritance is taken from the Scriptures.

Imprisonment for debt, except when property is concealed, is not in use. Any debt due in bill or specialty may be assigned, and the assignee may sue upon the same. Cases involving an amount not over forty shillings are to be heard by magistrates or a commission of three freemen without a jury. A suit is commenced by summons or attachment. Testimony may be taken in writing by any magistrate or authorized commissioner

⁴ *Massachusetts Historical Collections*, Series IV, vol. VII, 26.

⁵ *Body of Liberties*, p. 1.

⁶ Hutchinson, *State Papers*, 205.

⁷ *Book of General Laws and Liberties*, 1660, p. 8 and following.

to be used in criminal or civil cases. If the party cast has any new evidence or matter to plead he can obtain a new trial on bill of review. Free tenure of lands is adopted and all feudal incidents are abolished. Conveyances are to be by deed in writing. The period of prescription for title by possession is fixed at five years. Civil marriage is instituted.

The code of Ward was not the only one prepared for Massachusetts. John Cotton also submitted to the general court a body of laws, founded throughout on the Scriptures, with references thereto.⁸ This code, though published in England and there reputed to be in force in the colony, was never enacted at all by the general court. The conception of law current among the Puritans is well illustrated by the remark of Cotton that he should not "call them laws because God alone has the power to make law, but conventions between men." This theory of law as the command of God, the mediæval conception uncolored by the modern views of sovereignty, seems to have been firmly held by the Puritans of New, as of Old, England.⁹ The same view in addition to the reasons cited above may have prompted the general court not to call the Body of Liberties laws, but to pass them in the form of recommendations.

Turning now to the practice of magistrates and courts in the actual conduct of cases we shall find the same principles universally acknowledged. Everywhere, the divine law, interpreted by the best discretion of the magistrates, is looked upon as the binding subsidiary law; while the common law is at most referred to for the sake of illustration.

In 1641, the court had under consideration the case of the rape of a small child. There was a great question as to what kind of sin it was, and the court "sought to know the mind of God by the help of all the elders of the country." On the authority of Deuteronomy XVII, 12, it was held in another case that presumptuous sins were not capital unless committed in open

⁸ *Hutchinson Papers*, vol. I, 160.

⁹ *Figgis, Divine Right of Kings*, p. 223.

contempt of authority; and, in connection with this, Winthrop remarks that the "only reason that saved their lives was that the sin was not capital by any express law of God, nor was it made capital by any law of our own." In the same connection, Winthrop discusses the exaction of a confession from a delinquent in capital cases. It was decided that where one witness and strong presumption point at the offender, the judge might examine him strictly; but if there is only slight suspicion the judge is not to press him to answer.¹⁰ After the trial in the Hingham matter ¹¹ the Deputy Governor stated in a public speech: "The great questions that have troubled the country are about the authority of the magistrates and the liberty of the people. The covenant between you and us is that we shall judge you and your causes by the rules of God's law and our own."

On the trial of Mr. Hubbard¹² the court told the prisoner that he was to be tried by the law of God, which the magistrates were to judge by in case of the defect of the express law. Hubbard complained that the law of God admitted of various interpretations, and after being fined and bound to his good behavior he asked to know what good behavior was. The jury in this case found him guilty of uttering diverse speeches "tending to sedition and contempt of said government and contrary to the law of God and the peace and welfare of the country."¹³ The form of punishment was largely in the discretion of the magistrates.¹⁴ Although the English names of actions were used, the practice was exceedingly lax, and the action on the case was constantly used for the recovery of land; thus disregarding the fundamental distinction between real and personal property and real and personal actions in the English law.¹⁵ The distinctions between common law and admiralty procedure were totally disregarded.¹⁶

¹⁰ Winthrop's *History of New England*, II, 56, 250.

¹¹ *Ibid.*, II, 221, 228.

¹² *Ibid.*, 255.

¹³ *Massachusetts Historical Society Collections*, II, vol. IV, 110.

¹⁴ Lewis, *History of Lynn*, pp. 73, 81.

¹⁵ Washburn, *Judicial History of Massachusetts*, p. 61.

¹⁶ Case of Lady Latour vs. Bailey, Winthrop's *History of New England*, II, 192.

In the *Hutchinson Papers* ¹⁷ there is preserved a very interesting account of a case before Symonds, magistrate. To judge from his letters, Symonds was a careful student and great admirer of the English common law.¹⁸ The case under consideration, *Giddings vs. Brown*, brought up some very interesting questions as to the nature of law and the power of the courts. A dwelling had been voted by a town to its minister; the plaintiff had resisted the collection of the tax that had been levied to pay for this dwelling, and his goods were accordingly distrained. Symonds, in giving judgment for the plaintiff, says that "the fundamental law which God and nature has given to the people cannot be infringed. The right of property is such a fundamental right. In this case the goods of one man were given to another without the former's consent. This resolve of the town being against the fundamental law is therefore void, and the taking was not justifiable." Symonds refers with respect to the English law and quotes Finch and Dalton. He uses it, however, merely for illustration, and says "let us not despise the rules of the learned in the laws of England who have every experience." The precedents on which he relies are colonial, their binding force is recognized. The substance of the judgment is that property cannot be taken by public vote for private use. The opinion is interesting as an expression of natural law philosophy, and it is, perhaps, the earliest American instance where the power is claimed for the courts to control legislative action when opposed to fundamental law.¹⁹ The case, moreover, shows very clearly in what light the common law was regarded by the New England colonists; not at all binding *per se*, but in as far as expressive of the law of God to be used for purposes of illustration and guidance.

Popular courts of jurisdiction in petty cases, which had long fallen into disuse in England, were established in most of the

¹⁷ *Hutchinson Papers*, Vol. II, p. 1.

¹⁸ Letters of Symonds to Gov. Winthrop, *Massachusetts Historical Society Collections*, IV, vol. VII, pp. 124, 132.

¹⁹ Cf. Coke's opinion in *Bonham's Case*, 8 Rep., 118a.

colonies. In Massachusetts inferior courts consisting of five judges, one of whom was an assistant, and having jurisdiction in lesser civil and criminal cases, were early established.²⁰ Petty civil cases in the towns were tried by courts of one judge, or commissions of three freemen.²¹ A system of appeals was instituted, ascending from the town court to the inferior or county court, thence to the assistants, thence to the general court. Appeal to England was not allowed and claims for it were always strenuously resisted.

The pleadings in these courts were very concise and informal, and there was little regard paid to forms of action.²² Up to 1647, the pleadings seem to have been oral. By a law of that date²³ it was enacted that the declaration should be drawn up in writing and should be filed with the clerk of the court three days before the term.

Contrary to the English custom, a record of evidence given in the courts seems to have been kept from the earliest times. In 1650, it was enacted²⁴ that on account of the inconvenience of taking verbal testimony in court, the clerk not being able to make a perfect record thereof and prevent all mistakes, the evidence should be presented in writing to the court, either attested before a magistrate or in court upon oath. This provision, thoroughly at variance with the common law, excited the adverse comment of professional lawyers.²⁵

Coming now to the trial by jury, we find that this ancient and popular institution was in early use in Massachusetts, a jury having been empanelled a few months after Winthrop's arrival.²⁶ The system was, however, by no means unquestionably accepted, and seems to have had a very insecure tenure for a time. In 1642, a commission was appointed to consider

²⁰ *Massachusetts Colonial Records*, I, 169.

²¹ *Ibid.*, 239.

²² Washburn, *Judicial History*, 48.

²³ *Massachusetts Colonial Records*, II, 219.

²⁴ *Ibid.*, II, 211.

²⁵ *Documents Relative to the Colonial History of New York*, IV, 929.

²⁶ *Massachusetts Colonial Records*, I, 77-78.

whether to retain or dismiss juries in the trial of causes;²⁷ and it appears that juries were for a time abolished, for, in 1652, we find the following resolve "the law about juries is repealed and juries are in force again."²⁸

The mode of trial exhibits many interesting peculiarities. The province of judge and jury is quite correctly defined in an act of 1642, where the finding of matters of fact by the jury, instructions in law by the court, and the decision of matters of equity by the latter is provided for.²⁹ In 1657, the jury was permitted to present a special verdict.³⁰ But it seems that for a time the magistrates acquired a very considerable power of controlling the jury. Hutchinson says: "The jury sometimes gave their verdict, that there were strong grounds of suspicion, but not sufficient for conviction. Upon such a verdict the court would give sentence for such offenses as the evidence at the trial might have disclosed." He adds in a note the advice of Lieut. Gov. Stoughton to Governor Hineckly of Plymouth, given in 1681: "The testimony you mention against the prisoner I think is sufficient to convict him; but, in case your jury be not of that mind, if you hold yourself strictly obliged by the laws of England, no other verdict but 'not guilty' can be brought in; but, according to our practice in this jurisdiction, we should punish him with some grievous punishment according to the demerit of his crime, though not found capital."³¹

In 1672, an attempt was made to limit the power of the magistrates in this respect.³² For the controlling authority of the magistrates there is offered as a substitute the archaic method of attainting the jury for giving a verdict contrary to the weight of evidence; and the law allowing the magistrates to refuse the verdict of the jury is repealed. This is a remarkable instance

²⁷ *Massachusetts Colonial Records*, II, 28.

²⁸ *Ibid.*, IV, 107.

²⁹ *Ibid.*, II, 21.

³⁰ *Ibid.*, III, 425.

³¹ *Massachusetts Historical Society Collections*, Series II, Vol. I, p. XXII.

³² *Massachusetts Colonial Records*, IV, part 2, p. 508.

of reversion to an archaic method. The jury in such a case was to be tried by a new jury of twenty-four, and the court had no control over the verdict. It seems that many juries were attainted, because in 1684 it was enacted³³ on account of the unreasonable trouble caused by numerous attaints, that the cause of attaint shall be given in writing; that if the verdict is confirmed, the person attainting shall be fined 34 pounds; and that the jury may also prosecute him for slander, with other additional penalties. The jury were also at liberty, when they were not clear in their conscience about any case, "in open court to advise with any man they should think fit, to resolve and direct them before they gave their verdict."³⁴

In the colonial system of Massachusetts we find traces of the common law; the less technical parts of its terminology are in use, forms of contracts and deeds are modeled on English precedents, although for the latter acknowledgment and recording is essential to validity.³⁵ But the authority of the common law as a subsidiary system is nowhere admitted, its principles are radically departed from and its rules used only for purposes of illustration.

The magistrates administered a rude system of popular law and equity, on the basis of the Scriptures and their own ideas of right, generally to the satisfaction of the homogeneous Puritan communities; though there are some struggles recorded, such as that for written laws and for the control of the juries. Capt. Bredon writes to the Council of Colonies, speaking of the printed laws of Massachusetts: "What laws are not mentioned in this book are in the magistrates' breasts to be understood."³⁶ The elements dissatisfied with this regime generally left for Rhode Island, the Connecticut river settlements, Maine or New Hampshire, where society was less autocratic; but still we find a num-

³³ *Massachusetts Colonial Records*, V, 449.

³⁴ *Colonial Laws of Massachusetts Bay*, Ed. 1660, pp. 47, 48.

³⁵ *Massachusetts Colonial Records*, I, 116; and *Suffolk County Deeds*.

³⁶ *Documents Relative to the Colonial History of New York*, III, 39.

ber of protests recorded against the manner of administering the law by persons remaining in the colony.

The complaint that no one could have justice but members of the church³⁷ is very common on the part of outsiders. In 1646, there was a very important controversy, in which a party of men led by Robert Child demanded the establishment of English law. In their remonstrances³⁸ they say that they cannot discern a settled form of government according to the laws of England; nor do they perceive any laws so established as to give security of life, liberty, or estate. They object to discretionary judgments as opposed to the unbowed rule of law, and petition for the establishment of the wholesome laws of England, which are the result of long experience and are best agreeable to English tempers; that there should be a settled rule of adjudicature from which the magistrates cannot swerve. Those laws of England, they say, are now by some termed foreign, and the colony termed a free state.

In the answer by the general court³⁹ the petitioners are held up to ridicule for their own ignorance of what English laws they really wanted. It is then asserted that the laws of England are binding only on those who live in the English country, for neither do the laws of Parliament nor the King's writ go any farther. "The laws of the colony," they say in substance, "are not diametrically opposed to the laws of England, for then they must be contrary to the laws of God, on which the common law, so far as it is law, is also founded. Anything that is otherwise established is not law but an error, as it cannot be according to the intent of the law-makers to establish injustice." This is the true Puritan idea of law as the command of God; the general court asserts that the common law, so far as it is law, must embody divine justice. For their part the Puritans prefer to go to the original source of law, the Scriptures.

³⁷ *Massachusetts Historical Society Collections*, Series IV, vol. VII, p. 370.

³⁸ *Hutchinson Papers*, Prince Society, I, 189.

³⁹ Winthrop, *History of New England*, II, star p. 284.

In connection with this matter the general court also made a declaration which was evidently intended for the general public and the home government.⁴⁰ They there assert that the government is framed according to the charter and the fundamental and common laws of England. They add in brackets, "taking the words of eternal righteousness and truth with them as the rule by which all kingdoms and jurisdictions must render account." Then they make a comparison between the fundamental and common laws of England and the laws of the colony, taking Magna Charta as the embodiment of English common law; and they state that, as the positive laws of England are constantly being varied to answer different conditions, they should consider it right to change and vary their legislation according to circumstances. They confess an insufficient knowledge of the laws of England, and say, "If we had able lawyers amongst us we might have been more exact." Their comparison of the laws shows the rudimentary character of their knowledge. Finding some discretion allowed English judges in criminal cases they take this as a precedent for the Massachusetts method of inflicting penalties according to the rule of God's word. They conclude by instancing the extraordinary jurisdictions in England, the chancery, the court of requests, the admiralty and ecclesiastical courts, and say that experience shows that Englishmen may live comfortably and securely under some other laws than the common and statutory laws of England.

The methods of Massachusetts colonial justice are described by Letchford in his book, *Plainé Dealing*. He was a lawyer who had been employed in doing minor editorial work on the *Body of Liberties*. Owing to the prejudice against lawyers, general in the colonies but especially strong here, he was not permitted to practise his profession, and therefore was perhaps an unreasonably severe critic of the system under which he suffered. As his views are, however, corroborated by the statements of other witnesses, their truth so far as the proceedings

⁴⁰ *Hutchinson Papers*, 1, 197.

of the courts are concerned may perhaps be accepted. He says among other things⁴¹ that the governor in charging the grand jury uses the heads of the ten commandments. That in jury trials matters of law and fact are not distinguished.⁴² The records of the courts are not kept in due form of law, in most cases the verdict only being entered. Hence the disposition to slight all former laws and precedents, "but go hammer out new upon the pretense that the word of God is sufficient to rule us." He advises his brethren to "despise not learning nor the learned lawyers of either gown."

In his narrative to the council⁴³ Edward Randolph states that "the laws and ordinances of Massachusetts are no longer observed than they stand in their convenience; and in all cases, regarding more the quality and affections of the persons to their government than the nature of their offense." He states that it was regarded as a breach of the privilege of the colony to urge the observation of the laws of England, and notes some of the provisions repugnant to the common law, such as obtaining prescriptive title to land by possession for five years, and the use of the word of God as a rule in criminal cases. In another report in 1678 he states that the laws of England are neither in the whole nor in any part of them valid or pleadable in the colonial courts until received by the General Assembly.⁴⁴

The colony always resisted claims of a right of appeal to England; this was one of the most important points of controversy between the colonial court and the home government after 1660. In that year the colonists instructed Captain John Leveritt as their agent in England to resist any claims or assertions of appellate jurisdiction, because that would render government and authority in the colony ineffectual and bring the court into contempt with all sorts of people.

In 1677, the Privy council made specific objection to the

⁴¹ *Plaine Dealing*, Trumbull's edition, p. 26.

⁴² *Ibid.*, p. 27.

⁴³ *Hutchinson Papers*, II, p. 210.

⁴⁴ *Edward Randolph, Prince Society Publications*, II, 311.

laws of Massachusetts repugnant to the laws of England. The Attorney General submitted a catalogue of such laws.⁴⁵ In answer to these objections the general court made several amendments in 1681;⁴⁶ the law concerning rebellious sons, concerning Quakers, and the law against keeping Christmas were left out; but no alteration was made in the law of marriage and Sunday legislation. In connection with this controversy the general court again asserted the independence of the colony from English laws.⁴⁷ They speak of the laws of England as bounded within four seas and not reaching to America. The American subjects not being represented in Parliament should not be impeded in their trade by Parliament. Before this time legal proceedings had been carried on in the name of the colony. One of the results of the controversy was that the general court yielded in this respect, and process was hereafter issued in the name of the king.

After the charter had been annulled, there followed a strong and continued effort to introduce the common law. By the commission of Sir Edmund Andros, in 1688 the governor and council were appointed a court of record to try civil and criminal cases, their proceedings and judgment to be consonant and agreeable to the laws and statutes of England.⁴⁸ The arbitrary government of Andros, however, did perhaps more to introduce a knowledge of the common law, than this provision, because against his despotic rule the colonists now began to assert rights protected by the English law, such as the right of Habeas Corpus. Thus when we hereafter find expressions of admiration for or adherence to the common law, such as are very common in the succeeding century and especially at the beginning of the Revolutionary War, they refer rather to the general principles of personal liberty than to the vast body of rules regulating the

⁴⁵ Palfrey, quoting from Phillip's collection of manuscripts, *History of New England*, III, 309.

⁴⁶ *Massachusetts Colonial Records*, V, 321.

⁴⁷ *Ibid.*, V, 198-200.

⁴⁸ *Documents Relative to Colonial History of New York*, III, 539.

rights of contract and property and the ordinary proceedings in court.

By the charter of 1692, the appointment of judges and justices of the peace was given to the governor and the council. Their tenure was practically during good behavior;⁴⁹ but though the direct popular nature of the courts was thus destroyed, it was a considerable time before trained jurists came to control the administration of law in Massachusetts.

Chief Justice Attwood visited Boston in 1700, and in his report to the Lords of Trade⁵⁰ he states that he had "publicly exposed the argument of one of the Boston clergy, that they were not bound in conscience to obey the laws of England." He complains of various insults offered him while sitting as judge in the admiralty court. He attended the session of the Superior court at Boston, and there observed that their "methods were abhorrent from the laws of England and all other nations." He especially notes the ease with which new trials are obtained and the fact that evidence is offered in writing, which is a temptation to perjury, new proofs being admitted at the later trials. This criticism shows that there was no sudden breach in the development of Massachusetts law, and that at the beginning of the 18th century the old popular law was still largely administered in derogation of the more highly developed rules of the common law. It is stated that after the change in the appointment of judges, practice became very captious and sharp. In 1712, the first professional lawyer, Lynde, became Chief Justice, and after this we find that English books and authors are frequently cited.⁵¹ But the early character of Massachusetts law has never ceased profoundly to influence the system of that state, the originality of whose jurisprudence has always been recognized. Jefferson says in a letter to Attorney General Rodney, September 25, 1810,⁵² speaking of Lincoln, of Massa-

⁴⁹ Washburn, *Judicial History*, p. 138.

⁵⁰ *Documents Relative to Colonial History of New York*, IV, 929.

⁵¹ *Arguments of Valentine*, in *Matson vs. Thomas*, 1720, citing Coke and Hobart.

⁵² Jefferson's *Complete Works*, V, 546.

chusetts, as a possible successor to Cushing as Chief Justice: "He is thought not to be an able common lawyer, but there is not and never was an able one in the New England states. Their system is *sui generis* in which the common law is little attended to. Lincoln is one of the ablest in their system." How strongly the old view of law which we have noticed maintained itself in Massachusetts, we see from John Adams' statement in the *Novanglus*:⁵³ "How then do we New Englanders derive our laws. I say not from Parliament, not from the common law, but from the law of nature and the compact made with the king in our charter. Our ancestors were entitled to the common law of England when they emigrated; that is to say, to as much of it as they pleased to adopt and no more. They were not bound or obliged to submit to it unless they chose."

In Massachusetts, during the 17th century we find a continued, conscious, and determined departure from the lines of the common law. It is not accepted as a binding subsidiary system, the law of God there taking its place. Indeed, it colored and influenced the legal notions of the colonists, but they always resisted the assertion of its binding force. The absence of lawyers made the administration of a highly developed system impossible. We have a layman law, a popular, equitable system which lacks the elements of rigor, of clear cut principles, of unswerving application, but which forms a basis on which with the advent of legal training a strong original system could be reared.

Connecticut and New Haven.

In Connecticut and New Haven we find a development similar to that of Massachusetts. The Connecticut code of 1642 was copied from that of Massachusetts.⁵⁴ The fundamental order of New Haven⁵⁵ provides for the popular election of the

⁵³ 1774, John Adams, *Works*, IV, 122.

⁵⁴ *Connecticut Records*, I, 77.

⁵⁵ *New Haven Records*, I, 73.

magistrates, and for the punishment of criminals "according to the mind of God revealed in his word." The general court is also to proceed according to the Scriptures, the rule of all righteous laws and sentences. In the fundamental agreement⁵⁶ all freemen assent that the Scriptures hold forth a perfect rule for the direction and government of all men in all duties. The Scriptural laws of inheritance, dividing allotments, and all things of like nature are adopted, thus very clearly founding the entire system of civil and criminal law on the word of God. This principle is re-enacted in similar language in 1644.⁵⁷

In Connecticut the trial by jury was put into practice from the first, the use of the grand jury coming in somewhat later.⁵⁸ It is, however, provided that upon continued failure to agree, a majority of the jury could decide the issue, and in case of equal division, the magistrate had a casting vote.⁵⁹ In New Haven the institution of jury trial was not at first adopted.⁶⁰ It is stated that this was so settled upon some reasons urged by Mr. Eaton.

As already indicated, the system of popular courts was adopted in both colonies. In 1699, the practice of commissioning justices for stated periods was tried, but it was continued for only three years.⁶¹ The judges of these courts exercised a broad discretion. That Connecticut was independent of the home country in legal matters is noted by Quarry in his report to the Lords of Trade in 1707.⁶² If possible, these colonies departed even further from the common law than Massachusetts in their system of popular courts, absence or radical modification of the jury trial, discretion of the magistrates, and, in the case of New Haven, the clear and unequivocal assertion of the binding force of divine law as a common law in all temporal matters, as a guiding rule in civil and criminal jurisdictions.

⁵⁶*New Haven Records*, I, 1.

⁵⁷*Ibid.*, I, 130.

⁵⁸*Connecticut Records*, I, 9, 91.

⁵⁹*Ibid.*, 84.

⁶⁰*Massachusetts Historical Society Collections*, series II, vol. VI, 820.

⁶¹*Ibid.*, series VI, vol. III, 44.

⁶²*Documents Relative to Colonial History of New York*, V, 31.

New Hampshire.

The settlers of New Hampshire and Vermont were in many cases malcontents who had left the Puritan colonies. They were not so homogeneous a society, and therefore the assertion of the binding force of the common law could be more successfully made. The commission of 1680 orders proceedings in the courts to be consonant to the laws and statutes of England, regard, however, being had to the condition of the colonists.⁶³ The General Assembly, meeting at Portsmouth in March, 1679-80, passed a body of general laws in which they claimed the liberties belonging to free Englishmen. They, however, refused to admit the binding force of any code, imposition, law, or ordinance not made by the General Assembly and approved by the president and council. The code itself is very simple, but in place of biblical references English statutes are cited.⁶⁴ As a matter of fact it may be questioned whether this submission to English law, if any there was, was more than formal. The general court petitioned against appeals to England in 1680.⁶⁵ The settlers were so impatient of control that all questions of law and fact were decided by juries. The judges had a term of one year only and none of the influence of the Massachusetts magistrates.⁶⁶ Under this regime, the administration of the rules of the common law would of course be impossible. The early judges and chief justices were all business men, seamen, or farmers; only in 1726 did a man of liberal education, Judge Jaffray, graduate of Harvard in 1702, appear on the bench.⁶⁷ And it was only in 1754 that a lawyer, Theodore Atkinson, also a graduate of Harvard, became chief justice. Samuel Livermore, chief justice in 1782, though trained in the law, refused to be bound by precedents, holding, "that every

⁶³ Poore, *Constitutions, Charters and Documents*, p. 1276.

⁶⁴ Belknap's *New Hampshire*, p. 454; *New Hampshire Documents and Records*, I, 382.

⁶⁵ Cited in Belknap's *New Hampshire*, p. 457.

⁶⁶ Danl. Chipman, *Vermont Reports*, pp. 11, 19, 21.

⁶⁷ C. H. Bell, *Bench and Bar of New Hampshire*, 13.

tub should stand on its own bottom;" and looking upon the adjudications of English tribunals only as illustrations.⁶⁸ It may be said that no real jurist, no man acknowledging a regular development of the law by precedents and finding an authoritative guidance in the adjudications of the common law judges, held judicial power in New Hampshire during the entire 18th century.

Rhode Island.

This colony was consciously founded on a democratic basis.⁶⁹ The charter is made the basis of government, by which legislative action is to be restricted. In order to escape the imputation of anarchy, and to preserve every man safe in his person and estate, the common law is to be taken as a model for legislation in as far as the nature and constitution of the place will permit. The code itself shows a very archaic conception of law. In its classification it especially reminds us of the Anglo-Saxon dooms in the prominence it accords to crimes and torts. It classifies law under five general heads: (1) murdering fathers and mothers; (2) man slayers; (3) sexual immoralities; (4) men-stealers; (5) liars, under which heading are comprised perjury, breach of covenant, slander, and other torts. On the other hand, however, it contains some provisions of an advanced nature. Murder and man-slaughter are distinguished on the principle of malice aforethought. Theft committed by a child or for hunger is declared to be only petty larceny. Promises and contracts, especially for large amounts, are to be drawn up in writing. The conveyance of land must be made in this form. This provision by many years antedates the celebrated Statute of Frauds of English law. Imprisonment of debtors is forbidden; "none shall lie languishing for no man's advantage." Lands are made liable to execution. In general, the statement of the code is concise and clear; English statutes are frequently cited, but in spirit the code is thoroughly origi-

⁶⁸ Bell, *Bench and Bar*, p. 37.

⁶⁹ Code of Civil and Criminal Law of 1647; cited in full in Arnold's *History of Rhode Island*, I, 205, et seq.; *Rhode Island Colonial Records*, I, 156.

nal though in parts archaic. That it was considered a sufficient statement of law is shown by the enactment that "In all other matters not forbidden by the code all men may walk as their conscience persuades them." A modified form of jury trial is instituted by a later enactment.⁷⁰ The province of judge and jury is there defined. As in Massachusetts attain is made a remedy for a false verdict.

Bellomont sent the laws of Rhode Island to the Council in 1699,⁷¹ when he gives it as his opinion that the world never saw such a parcel of fustian. He also says: "Their proceedings are very unmethodical, no wise agreeable to the course and practice of the courts of England, and many times very arbitrary and contrary to the laws of the place; as is affirmed by the attorneys at law that have sometimes practiced in their courts." * * * "They give no directions to the jury nor sum up the evidences to them, pointing out the issue which they are to try." Later, however, in 1708, Governor Cranston writes to the Lords of Trade: "The laws of England are approved of and pleaded to all intents and purposes, without it be in particular acts for the prudential affairs of the colony."⁷²

Up to the time of the Revolution, judges were elected annually from the people. The Newport court records show us the extent of the discretion of magistrates. In an action for debt the court, considering the defendant's poverty, ordered him to work for the plaintiff at carpentry until the debt were extinguished. Meanwhile other creditors were forbidden to sue him. Even after a verdict of not guilty, the court often imposed costs or ordered the accused to leave the colony.⁷³ The attitude of Rhode Island towards lawyers is shown by the fact that by an act of the general assembly in 1729 they were forbidden to be deputies, their presence being found to be of ill consequence.⁷⁴

⁷⁰ *Rhode Island Colonial Records*, I, 198.

⁷¹ *Documents Relative to Colonial History of New York*, IV, 600.

⁷² Durfee, *Gleanings from the Judicial History of Rhode Island*, p. 78.

⁷³ *Ibid.*, p. 127-137.

⁷⁴ *Arnold's History of Rhode Island*, II, 98.

CHAPTER II.

THE MIDDLE COLONIES.

New York.

In this colony the common law received early recognition and an approach was made to complete and intelligent enforcement. The population of New York was exceedingly heterogeneous; the original Dutch settlers, the early English settlers of various character from the different colonies and the mother country. The close knit social relations found in Massachusetts and Connecticut are here absent, and popular law cannot therefore be so readily developed. There is a demand for a system of common law by which the relations and interests of these various elements may be regulated. The colony being under royal authority almost from the beginning, its rulers soon accustomed it to the principles of the English common law. Thus when the growing feeling of unity and nationalism called for a unification and harmonizing of American law, New York state, which had most successfully adapted the common law to American conditions, became the leader in juristic development. Its judges, like Kent, became the authoritative expounders of the American form of the common law. But, on the other hand, many of the original American ideas in jurisprudence, such as the reform of the law of real property and the law of pleading, which we find in germ in the early history of the other colonies, were carried to completion and given their lasting form in the state of New York, whose jurists had profited from a longer training in a regular system of jurisprudence.

We must, however, by no means conclude that the common law was administered in New York from the very beginning of

English occupation as a complete subsidiary system. The feeling that for a new colony a new body of laws is necessary led to the compilation of what is known as the Duke of York's laws, which were promulgated at an informal assembly at Hampstead in 1665.¹ The first New York legislature met in 1683, and, among other acts, passed bills regulating the judicial proceedings, and for preventing perjuries and frauds.² Governor Nichols, before courts had been created, took upon himself the decision of controversies and pronounced judgment after a summary hearing.³ In writing to Clarendon, July 30, 1665, he says: "The very name of the Duke's power has drawn well-affected men hither from other colonies, hearing that the new laws are not contrived so democratically as the rest."⁴ At this time laws are confirmed, reviewed, and amended by the general assizes composed of the governor, the general council and the judges upon the bench. A year later, April 7, 1666, Nichols writes to Clarendon⁵ remitting a copy of the laws collected from the laws of the other colonies with such alterations as would tend to revive the memory of old England; he says that "the very name of Justice of the Peace is held an abomination, so strong a hold has Democracy taken in these parts." He complains of the refractory disposition of the people, and describes his efforts to introduce English statutes and authority. It is apparent from this correspondence that it was considered necessary to restate the law in a codified form for the use of the colonists; and an informal transfer of the common law in its original "unwritten" character was evidently not considered sufficient or suitable to the circumstances by the men in authority.

Governor Dongan in his report to the Committee on Trade,⁶ February 22, 1687, gives a list of the courts of justice established at that time: (1) a court of chancery composed of the governor

¹*Documents Relative to Colonial History of New York*, III, 260, 416; IV, 1154.

²*Ibid.*, III, 355.

³*Smith's History of New York*, 55.

⁴*New York Historical Society Collections*, 1869, 75.

⁵*Ibid.*, p. 118, 119.

⁶*Documentary History of New York*, I, 147.

and council, which is the supreme court of appeals; (2) the courts of oyer and terminer held yearly in each county; (3) the court of the mayor and aldermen in New York; (4) the courts of session (justices of the peace); (5) court commissioners for petty cases; (6) a court of adjudicature, a special court established to hear land cases. These courts had none of the popular elements which we have noted in the Puritan colonies. Governor Dongan also states that the laws in force were the laws of the Duke of York and the acts of the general assembly, not mentioning the common law in this connection. In a similar report, Governor Nichols⁷ states that "all causes are tried by juries, and that there are no laws contrary to the laws of England," while he ascribes full law-making power to the court of assizes (1669). Governor Andros reports that, "He keeps good correspondence with his neighbors as to civil, legal and judicial proceedings." Bellomont, in 1699, sending a copy of the printed laws to the council, asks for a careful perusal and criticism of them by some able lawyer in England; which would indicate the absence of trained jurists in the colony at that time.⁸ In a report on the methods of proceedings in court, William Smith writes to Bellomont in 1700:⁹ "The rules and methods we are governed by in all trials is the common law of England, and the several statutes declarative thereof according to the manner and methods of the courts at Westminster." In the earlier days of the colony, confused notions of law and equity seem to have prevailed; and in a number of reported cases tried on Long Island after verdict of the jury there was an appeal to equity, most generally successful. No settled rules were here regarded, but a discretion similar to that of the New England magistrates was exercised.¹⁰ In one of these cases the judgment is said to be given according to law and good conscience.¹¹

⁷ *Documentary History of New York*, I, 87.

⁸ *Documents Relative to Colonial History of New York*, IV, 520.

⁹ *Ibid.*, VIII, 28.

¹⁰ *Documents Relative to Colonial History of New York*, XIV, 570, 589, 600, 629.

¹¹ *Underhill vs. Hempstead*, *Ibid.*, 589.

Immediately upon the occupation by the English, the jury came into use in New York. Jury trials are, however, at first, very informal, more after the manner of a simple arbitration, and verdicts are often given in the alternative.¹²

In the form of testamentary disposition the Roman Dutch law of the New Netherlands left abiding traces. The method of making wills by oral declaration before a notary, or by a written and sealed instrument deposited with that official, was used long after the first English occupation.¹³

We find that in these early days the functions of the court were not only judicial but administrative, much like those of the earliest itinerant judges in England. Thus the judges are directed to make inquiries into town training, the bearing of arms, the price of corn, wages, and escheats.¹⁴ As another reversion to older practice, we may note the concentration of various functions, judicial, administrative, and legislative, in the hands of the colonial council of the earliest time. A still closer analogy to mediæval English history in this respect we shall find in the case of Pennsylvania.

In the year 1700, a professional English lawyer, Attwood, became chief justice of New York. It was his avowed purpose to introduce the common law and practice of the English courts into the colony. He was, however, too assertative, and favored strong government too much, so that he in some cases perverted the law to his own uses, as when he declared that whatever was treason before 25 Edward III was still treason at common law;¹⁵ or when he held that a grand jury was only an inquest of office and that eleven could indict.¹⁶ He complained in a letter to the Lords of Trade¹⁷ that "several here cannot well bear with the execution of the laws of England." His methods soon led to his unpopularity and his final disgrace.

¹² Fernow, *Records of New Amsterdam*, V, 267ff.

¹³ Fernow, *Calendar of Wills*, p. IV.

¹⁴ *Documents Relative to Colonial History of New York*, XIV, 637.

¹⁵ *Ibid.*, IV, 974.

¹⁶ *Ibid.*, 1010.

¹⁷ *Ibid.*, 923.

As in other colonies, lawyers were unpopular in the early days of New York. "The general cry of the people both in town and country was, 'No lawyer in the Assembly!'"¹⁸ As we have seen, the early governors exercised what was called an equity jurisdiction, but no regular court of equity was established. In 1711, Governor Hunter addressed the Lords of Trade in this matter. He speaks of the necessity of giving equitable relief in many cases, and instances the case of a merchant, who inadvertently confessed judgment for 4,000 pounds, the real debt being 400 pounds, and who then languished in prison. He says that the House declared that the trust of the seal constitutes him the Chancellor, but having already too much business and being ignorant in law matters he asks the Lords of Trade for advice.¹⁹ They simply answer²⁰ that he is authorized to establish, with the consent of the council, any court that may be necessary. A court of chancery was accordingly established, but in 1727 the assembly resolved that the creation of this court without its consent was illegal. Its fees were reduced and its jurisdiction languished for a time.²¹ Colden ascribes these resolves to the vindictive intrigues of the speaker, who had been defeated in a chancery suit.²²

The complete doctrine of the binding force of the common law in New York was not stated before 1761, but a most thoroughgoing statement is found in Governor Tryon's report,²³ where he declares that "the common law of England is the fundamental law of the province, and it is a received doctrine that all the statutes enacted before the province had a legislature are binding upon the colony;" also that in the court of chancery the English practice is followed. Some years before, in 1762, Chief Justice Pratt, in a memorial to the Lords of Trade,

¹⁸ Gov. Colden to Hillsboro; *Documents Relative to Colonial History of New York*, VIII, 61.

¹⁹ *Documents Relative to Colonial History of New York*, V, 208.

²⁰ *Ibid.*, 252.

²¹ Smith's *History of New York*, 270.

²² *New York Historical Society Collections*, XVIII, 211.

²³ 1774; *Documentary History of New York*, I, 752.

complains of the insufficient influence of the judiciary. He says that "All the colonies being vested with legislative power, their systems of laws are gradually varying from the common law. If the judgments of the supreme courts are only vague and desultory decisions of ignorant judges the mischief is augmented, and a more influential and better paid judiciary is called for."

New Jersey.

The two parts of New Jersey, East and West Jersey, had a different social complexion, and we may therefore look for divergent views on the subject of law. West Jersey was a pure Quaker commonwealth, where the influence of Penn was very strong; while in East Jersey conditions similar to those in New York prevailed. We find, however, in both parts of New Jersey a system of popular courts. In East Jersey²⁴ the court system was established by the legislature in 1675. A monthly court for the trial of small causes was held in each town of the province by two or three persons chosen by the people. County courts were held twice yearly in each county; from these there was an appeal to the court of chancery. Proceedings in these courts were of the utmost simplicity. It was provided that any person might plead for himself; that no money was to be taken for pleading or advice.²⁵ In West Jersey a similar system of courts prevailed; justices of the peace, county courts, and a supreme court of appeals; the latter was instituted in 1693 and a final appeal from it to the general assembly was authorized in 1699. The term, court of chancery, is not used in West Jersey. The power of the jury was exaggerated, the three judges having no authority to control the verdict of the twelve men "in whom only the judgment resides." In case the judges should refuse to pronounce judgment, any one of the twelve by consent of the rest may do so.²⁶ Capital punishment was not

²⁴ *Grants and Concessions*, p. 96.

²⁵ *Ibid.*, p. 128.

²⁶ *Ibid.*, p. 396.

fixed by the law. It was enacted²⁷ that "All persons guilty of murder or treason shall be sentenced by the general assembly, as they in the wisdom of the Lord shall judge meet and expedient." This would indicate a view of law similar to that held by the colonists of Massachusetts and New Haven.

The early laws of East Jersey were founded largely on scriptural authority.²⁸ Thus the law of trespasses and injuries by cattle, of injury by fire, of negligence, and the criminal law, are in agreement with the laws of the Exodus. In 1675 imprisonment for debt was prohibited except in cases of fraud. In 1698 the privileges of the English common law were assured to every one. In Delaware no professionally trained judge held office before the Revolution.²⁹

Pennsylvania.

The colony of Pennsylvania was fitted out with the most complete system of colonial codes. There was (1) the frame of government, which was unchangeable without the consent of the governor and six-sevenths of the freemen in council and assembly, all freemen at that time being members of the assembly; (2) there were the laws agreed upon in England in 1682, which had the same provisions as to alteration; (3) the Great Law or body of laws enacted at Chester in 1682, containing sixty-one chapters and called the written laws to distinguish them from the foregoing two, called printed laws; (4) the act of settlement passed in Philadelphia in 1683; (5) the laws made at an assembly in Philadelphia in 1683, consisting of 80 chapters; (6) the frame of government of 1683; (7) the frame of government of 1696; and, finally, (8) the laws of October, 1701.³⁰ These laws are of great interest to the student of legislation, containing the opinions of enlightened and thoughtful statesmen embodied in enactments and gradually modified by

²⁷ *Grants and Concessions*, p. 404.

²⁸ Whitehead, *East Jersey under the Proprietors*, p. 239.

²⁹ Grubb, *Judiciary of Delaware*, p. 9.

³⁰ See the collection called *The Duke of York's Laws and Pennsylvania Colonial Laws*, which will be cited simply as *The Duke of York's Laws*.

practical experience in colonial affairs. They show clearly how very necessary a complete and full statement and codification of the law that should prevail was held by the founders of Pennsylvania; that they did not rely on an informal transfer of the applicable parts of the common law; but that they, with great painstaking, stated in entirely original form the provisions considered necessary for colonial society.

These laws contain many new and far-reaching reforms. Thus, in the laws agreed upon in England in 1682 there are the following provisions concerning procedure in the courts. Persons may appear in their own way and according to their own manner and personally plead their cause; the complaint shall be filed in court fourteen days before trial; a copy of the complaint is to be delivered to the defendant at his dwelling house; the complaint must be attested by the oath of the plaintiff;³¹ all pleadings and processes and reports in court shall be short and in English and in ordinary and plain character, that they may be understood and justice speedily administered.³² This provision antedates by almost two centuries the celebrated New York code-pleading reform, and this clause very clearly and simply states the object this reform sought to bring about. The period of prescription for the acquisition of title to land is fixed at seven years.³³ The lands and goods of felons shall be liable to make satisfaction to the party wronged.³⁴ This is a return to an older idea of law, which at that time did not prevail in the English law; for a felony only the king enforced a forfeiture, the injured party could not obtain any satisfaction. In the laws made at Philadelphia in 1683, there is contained a chapter enumerating the fundamental provisions which are to be changed only by the consent of six-sevenths of the council and assembly; this early attempt to separate the fundamental from the secondary provisions of the law is of great interest to

³¹ *The Duke of York's Laws*, Laws of 1682, Chap. 6.

³² *Ibid.*, Chap. 7.

³³ *Ibid.*, Chap. 16.

³⁴ *Ibid.*, Chap. 24.

students of American constitutional development. The subjects referred to as fundamental are the following: Liberty of conscience, naturalization, election of representatives, taxes, open courts and freedom of pleading, giving evidence, return of inquest and judgment by inquest (jury), bail and liberty of person, registry, marriage, speedy justice, the use of the English language in laws and proceedings.

The proceedings of the earliest courts were quite informal. We have some accounts of trials, before the coming of Penn, under the Duke's laws which provided for a jury of six or seven. The major part of this jury could give in a verdict. An informal statement of the matter at issue was made, and though the names of actions were used, there was no sharp discrimination and not even the distinctions between civil and criminal cases were clearly drawn. The administration of justice was rather founded upon the ideas of the magistrates than on any rules of positive law.³⁵ Lord Petersboro, during his visit to Pennsylvania, was astonished at the simplicity and fewness of laws, the absence of lawyers and the informality of judicial proceedings.³⁶

County courts were instituted in the territory later called Pennsylvania in 1673. The procedure was informal, juries of six or seven were in use.³⁷ Under the new regime, the jurisdiction of courts was defined by the laws of 1683, Chap. 70, and in 1684, courts were given jurisdiction in equity as well as in law.³⁸ The same court even reversed in equity its own judgment in law.³⁹ Against this method the assembly complained.⁴⁰ In a number of the courts, the names of English actions were used, but *case* was often substituted for *eject-*

³⁵ See *Pennsylvania Archives*, vol. VII, pp. 725-730; *The Duke's Laws*, 462; *Memoirs of the Historical Society of Pennsylvania*, vol. VII; Dr. Geo. Smith's *History of Delaware County*.

³⁶ I Spencer's *Anecdotes*, 155, quoted in *Pennsylvania Bar Association Reports*, I, 229.

³⁷ *Duke's Laws*, 414.

³⁸ *Ibid.*, 167.

³⁹ *Hastings vs. Yarrall, Records Chester County Court*, 1686.

⁴⁰ *Votes of the Assembly*, I, 76.

ment.⁴¹ The practice was very much like modern code practice; the complaint was filed fourteen days before trial; ten days before, the defendant had to be summoned, arrested or his goods attached. In court, he might answer in writing; the pleadings were to be in the English language; any defense, legal or equitable, might be interposed.⁴² Thus from the first legal and equitable relief was administered by the same courts in Pennsylvania. By the laws of 1683, Chap. 71, an informal body of arbitrators, called peace-makers, was instituted. The appellate court was called the provincial court, but the council also had appellate jurisdiction; and in connection with this it had a jurisdiction, like that of the permanent council of the mediæval English kings and of the Star Chamber, to punish maladministration and malfeasance on the part of powerful officials.⁴³ As the English Parliament of the time of Edward III, so the Pennsylvania assembly petitioned against this extraordinary jurisdiction. In 1701, it requested that "no person shall be liable to answer any complaint whatsoever relating to property before the governor or his council or in any other place but the ordinary courts of justice."⁴⁴

Pennsylvania at this early period effected the union of equity and law in jurisdiction and in practice, a method that has always characterized the jurisprudence of that state. The voluminous legislation in the case of Pennsylvania may be due to the fact that the charter granted by Charles II. declared that the laws of property and of crimes in the province should be the same as they were in the kingdom of England, until altered by the proprietor. The legislation of Pennsylvania covering virtually the whole field of property law may be called the first complete codification of law made in America.

Penn himself was anxious to secure the services of trained

⁴¹ *Sussex County Records*, 1682, quoted in *Pennsylvania Bar Association Reports*, I, 362.

⁴² Laws of 1683, Chap. 66; Laws of 1684, Chap. 167.

⁴³ *Pennsylvania Colonial Records*, I, 20, 79, 95, 96.

⁴⁴ *Ibid.*, II, 37.

lawyers. In a letter to Logan⁴⁵ he says that he has granted Roger Mompesson the commission of chief justice and he advises the people to lay hold of such an opportunity as no government in America ever had of procuring the services of an English lawyer. Mompesson, however, did not remain in Pennsylvania long; he went to New York where he became chief justice, being appointed by Cornbury. The first lawyer who became chief justice of Pennsylvania was Guest, in 1701.⁴⁶

The early law of Pennsylvania is very original and contains the germs of many developments that specially characterize American jurisprudence. There was, in this colony, from the first a desire for settled legal relations, which finds expression in a discussion in the colonial council in 1689. When it was there proposed that in doubtful cases the magistrates might apply the colonial laws or the common law at their discretion, this was held too uncertain, and the sole validity of the laws of Penn was upheld.⁴⁷ On the question of substituting affirmation for oath, numerous English law precedents were, however, cited by the assembly to the governor.⁴⁸ The law of manslaughter is left to be determined by the law of England, in 1705.⁴⁹

Maryland.

By the charter of Maryland, full powers of government were given to the proprietor. He might establish laws, and was not required to submit them for the approval of the Crown. He could establish courts, and process ran in his own name, and he was empowered to grant titles of nobility. He stood in the position of a count palatine.⁵⁰ In 1635, the first legislative assembly met, passing a body of laws which was rejected by the proprietor. In 1637, the proprietor and the assembly mutually rejected laws proposed by each other. This caused a

⁴⁵Quoted in Field's *Courts of New Jersey*, 58.

⁴⁶*Penn and Logan Correspondence*, I, 19, 48.

⁴⁷*Pennsylvania Colonial Records*, I, 291.

⁴⁸*Ibid.*, II, 627.

⁴⁹*Ibid.*, 210.

⁵⁰Brown, *Civil Liberty in Maryland*, *Maryland Historical Society Papers*, 1850.

serious dead-lock, and it seemed impossible to create a code of laws such as had been found necessary in all the other colonies. The colonists, accordingly, in the absence of a code of positive laws claimed that they were governed by the common law of England so far as applicable to their situation. The proprietor opposed this claim on account of the interference with his rights, and the controversy thus arising was not finally settled until 1732.⁵¹

The rule of judicature was first fixed by the laws of 1642, in which it was ordered that civil causes should be tried according to the law and usage of the province, having regard to the former precedents. In defect of such law, usage, or precedent, the case shall be determined according to equity and good conscience "not neglecting (so far as the judge shall be informed thereof and shall find no inconvenience in the application to this province) the rules by which right and justice useth and ought to be determined in England." The common law of England seems here rather to be looked upon as a system useful for illustration and guidance than a subsidiary law; equity and good conscience was considered to afford proper rules to fill the omissions of the positive law.⁵²

The rules for trial were in many respects novel. The judge is allowed to administer an oath to either party in a civil cause, and on the refusal of the party to testify may proceed as if the matter asked had been confessed.⁵³ The power of the judge in controlling the jury is very great. If he thinks a verdict unjust he may return the jury or charge another. If he find the jury evidently partial or willful, he may charge another jury, and if their verdict is contrary the first jurors may be fined. Among these provisions we also find one of the earliest exemption laws. Tobacco, necessary clothing, bedding, utensils, and tools are exempt from execution.⁵⁴

⁵¹McMahon's *History of Maryland*, Chap. III.

⁵²*Archives of Maryland, Proceedings of General Assembly*, 147.

⁵³*Ibid.*, p. 150.

⁵⁴*Ibid.*, p. 152.

The fettered legislative powers of this colony, the unlimited discretion allowed the governor and his council in administration, by the charter, and the somewhat heterogeneous character of the population, led the colonists later more strenuously to insist upon the observance of the principles of the common law as a subsidiary system. Therefore we find that in 1662 an act was passed declaring that when the laws of the province are silent, justice is to be administered according to the laws and statutes of England; and that "all courts shall judge of the right pleading and the inconsistency of the said laws with the good of the province according to the best of their judgment."⁵⁵ This act was in force for only a short time, and the rule of judicature was therefore not long established by express law. It is, however, the first definite recognition in America of the power of the courts to apply the common law of England to colonial conditions, and to reject provisions deemed unsuitable. The rule stated in the act of 1662 was also contained in the commission of judges, and thus the proprietor seems to have sanctioned this adoption of the common law; the later controversy turned more on the question of the adoption of the statute law of England.

In 1674, an attempt was made to determine by law what English criminal statutes were in force in Maryland. The lower house insisted on the adoption of the whole English statute law, saving all laws of the province not repugnant to the laws of England.⁵⁶ The council argued with the lower house, asking them to consider the dangerous consequences of an adoption of the entire English criminal law. They referred to the volume of the English laws and to the difficulty of ascertaining what statutes are at present in force. On account of this uncertainty the lower house is requested to designate certain statutes which are to be re-enacted and thus be a guide to the judges.

In 1678, we find that it is ordered to purchase Keeble's

⁵⁵*Maryland Archives, Proceedings of Assembly*, p. 436.

⁵⁶*Maryland Archives, Assembly Proceedings, 1666-1676*, p. 374.

Abridgment of the English Statutes and Dalton's *Justice* for the use of the various county courts.⁵⁷

The struggle between the proprietor and the people concerning English laws revived in 1722. The people claimed that the lord proprietor had already allowed them the benefit of the common law as their right according to the common opinions of the best lawyers, and that the controversy now was only concerning the applicability of the English statutes.⁵⁸ Lord Baltimore resisted the introduction of the English statutes "in a lump," as he expressed it, as doing away with his veto power; while the lower house insisted upon a complete adoption. By the act of 1732 the controversy was settled by the following somewhat equivocal statement that "when the acts and usages of the province are silent the rule of adjudication is to be according to the laws and statutes and reasonable customs of England, as used and practised within the province."⁵⁹ However, the power of the courts to apply any English law, customary or statutory, which they found suitable to American conditions was no longer disputed.

The opposition to lawyers common in the colonies we also find in Maryland.⁶⁰ The great influence which the theory of the adoption of the common law gave to the courts was recognized in a resolve of 1684, which stated "that it left too much to discretion and is an open gap to corruption."⁶¹ At this time, however, the lord proprietor insisted that if the English laws were to be used the governor and chief justice must be allowed to decide when they ought to be applied. Only on this basis would he consent to a re-enactment of the judicature act.⁶² The attitude of the people toward the proprietor is further illustrated by the fact that an appeal to the king in legal proceedings was asked for.⁶³

⁵⁷*Maryland Archives, Proceedings of Assembly*, 1678-83, p. 70.

⁵⁸See citations in McMahon's *History of Maryland*, Ch. III.

⁵⁹McMahon's *History of Maryland*, p. 127.

⁶⁰*Proceedings of Assembly*, II, 168.

⁶¹*Maryland Archives, Proceedings of Assembly*, 1684-1692, p. 71.

⁶²*Maryland Archives, Lower House Journal*, 1676-1702, q. 107.

⁶³*Maryland Archives, Proceedings of Council*, II, 140.

Although, even in the earlier practice of Maryland, the terms of English law were used, its principles were often entirely neglected, and matters settled according to a rough equity.⁶⁴ Thus, in a case of homicide, the jury brought in a verdict finding accidental killing and no negligence; the court, however, fined the person who had handled the weapon that caused the accident. In another criminal proceeding the accused is arraigned and pleads guilty before the grand jury passes on the indictment and finds it *billa vera*.⁶⁵

⁶⁴*Maryland Archives, Provincial Court.*

⁶⁵*Ibid.*, p. 183.

CHAPTER III.

THE SOUTHERN COLONIES.

Virginia.

The prevailing belief that codes of law are necessary for new colonies is evidenced by Crashaw's sermon preached before the London Company in February, 1609-10. Crashaw says: "Be well advised in making laws, but being made let them be obeyed, and let none stand for scare-crows, for that is the way at last to make all to be contemned."¹

The instruction for the government of the colonies² fixed general rules for the descent of lands, criminal law, jury trials, and placed civil jurisdiction in the hands of the governor and council. The first code intended for the colonies, printed at London in 1612, and entitled *Laws Divine, Moral and Martial*,³ was exceedingly severe, and Sir Thomas Smith, the governor, was later much abused for having introduced it into Virginia. On account of the character of the population a strict rule was, however, absolutely necessary. In 1620, an attempt was made by the London company to compile a more adequate and humane code. Sir Edwin Sandys proposed the appointment of several committees for the following purposes: (1) compiling the laws of England suitable for the plantation; (2) collecting the orders and constitutions already in existence; (3) revising the laws passed by the Assembly. These committees were finally to meet and harmonize the entire body of laws which was then to be submitted to the king. Among the commissioners was

¹Brown, *Genesis of the United States*, p. 371.

²*Ibid.*, pp. 368-71.

³*Ibid.*, p. 528.

John Selden.⁴ These committees, however, did not report and Governor Yeardley asked for authority to make a collection of suitable laws.⁵

The first legislative assembly of Virginia met in 1619. It passed a number of laws and petitioned the council that they would "not take it in ill part if these laws passed current and be of force until we know their further pleasure out of England, for otherwise this people would in a short time grow too insolent." There is here so far no claim of the immediate validity of English laws in the colony, and all parties concerned seem to think the formation of a new code adapted to the circumstances of the settlers necessary. In 1631, the oath of commissioner of monthly courts was fixed as follows: "You shall do equal right to poor and to rich after your cunning, wit and power and after the laws and customs of this colony, and as near as may be after the laws of the realm of England."⁶ There was not in Virginia, as we have noted in many of the other colonies, a system of courts whose magistrates were elected by the people. The county courts were presided over by eight or ten gentlemen receiving their commission from the governor. Notwithstanding the source of their appointment, these men, not being educated in the law, would perhaps not be governed by considerations much different from those obtaining in the popular courts of Massachusetts and Connecticut. The large number of the members of the court is of itself a reversion to the very archaic type of Doomsmen of the Anglo-Saxon courts, who there declared the custom and fixed the mode of trial. Appeal lay from these courts to the general court, composed of governor and council. Their jurisdiction grew up by custom and the forms of proceedings were quite irregular. They also exercised a general chancery jurisdiction.⁷

⁴Proceedings of the Virginia Company of London. *Virginia Historical Collections*, vol. VII, p. 55.

⁵Ibid., p. 55.

⁶Hening, *Statutes at Large*, vol. I, p. 169.

⁷Campbell, *History of Virginia*, p. 352.

By the statutes of 1661-1662 procedure in the courts was regulated. At the time of the Restoration Virginia seems to have been especially anxious to show herself loyal to England, and these enactments breathe a deep respect for the common law. In the preamble it is stated that the legislature has endeavored in all things to adhere to these "excellent and refined laws of England to which we profess to acknowledge all due obedience and reverence." As a reason for enacting laws at all they assign the vast volume of the English law from which courts would be unable to collect the necessary principles without the aid of such codification.⁸ The former laws are repealed and a new code is enacted. As some former laws restrained the trial by jury quite contrary to the laws of England, the law of juries is restated with special carefulness and precision. It is interesting to note in this connection that the colonists express their regret that they are unable to comply with the requirement of the English jury system that the jurors shall come from the immediate neighborhood of the place where the fact was committed; but they state that they desire to approach as near as possible to compliance by enacting that six men of the ablest and nearest of the inhabitants of the county shall be on the jury.⁹ This reminds us of Sir John Fortescue's contention that France could not have the jury system, because there no neighborhood could produce twelve intelligent and substantial jurors. In this code the period of prescription for land is limited to five years.¹⁰

The system of itinerant judges existed in Virginia for some time, but was abolished in 1662 on account of the great charge to the country.¹¹ The nature of the procedure in the county courts is seen from the provision that the bill or complaint must be filed the day before court, that the answer and judgment as well as evidence in the case is also to be filed, that the judg-

⁸Hening, *Statutes at Large*, vol. II, 43.

⁹Ibid., II, 63.

¹⁰Ibid., 97.

¹¹Ibid., II, 179.

ment is to be endorsed on the complaint if for the plaintiff, on the answer if for the defendant.¹²

The administration of law in Virginia was in the hands of the country gentlemen who looked down upon the legal profession, and in no state do we find more hostile legislation concerning lawyers than in the Old Dominion. In 1645 an act was passed expelling the mercenary attorneys.¹³ In November, 1647, it is enacted that none shall plead for recompense, That in case the courts shall perceive that "either party by his weakness shall be like to lose his cause, they themselves may open the cause or may appoint some fit man out of the people to plead the cause, but shall not allow any other attorneys." In 1656 the hostile acts were repealed, but only a year later there was again proposed in the house "a regulation or total ejection of lawyers," whereupon the decision was "by the first vote an ejection."¹⁴ A new act was therefore passed¹⁵ forbidding any person to plead or give advice in any case for reward. The governor and council rather opposed this enactment, but promised to consent to the proposition "so far as it shall be agreeable to Magna Charta." A committee was appointed, who upon considering Magna Charta, reported that they did not discover any prohibition contained therein.¹⁶ In 1728, in a paper on the state of the colonies in America, Keith gives a very unfavorable account of the administration of law in Virginia. In order to unify and settle the law he favors the appointment of circuit judges from England.¹⁷ Governor Gooch, in his answer to Keith's criticisms, says that the practice of courts is exactly suited to the circumstances of the respective governments and as near as possibly can be conformable to the laws and customs of England, and that the judges are of com-

¹² Hening, II, 71.

¹³ Hening, I, 482.

¹⁴ Hening, I, 495.

¹⁵ Ibid., p. 482.

¹⁶ Neill's *Virginia Carolorum*, p. 264.

¹⁷ Byrd Manuscripts, 1728, p. 222.

petent knowledge in the laws, though not all of them profound lawyers.¹⁸

The Carolinas.

In the case of the Carolina colonies the enforcement of a very complete code, the celebrated Fundamental Constitutions, was attempted by the proprietors. These Constitutions were reactionary in the extreme, and attempted to introduce an intricate feudal system into the new colony. The redeeming feature of the act lies in its very liberal provisions concerning religious affairs, giving any body of believers the right to worship according to the dictates of their conscience. It is very doubtful if aside from these provisions concerning religion the Fundamental Constitutions had any permanent influence in molding the jurisprudence of the Carolinas. They were first promulgated in 1668, and were reissued in modified forms repeatedly until their final abandonment in 1698. The purpose of this code was to "establish the interest of the proprietor with equality and without confusion that the erecting of a numerous democracy may be avoided."¹⁹

We have no satisfactory information about the actual administration of justice in the early days of Carolina. The different colonies in the Carolinas had originally, however, very little in common, being settled by various elements. And it is highly probable that each of these colonies developed at first its own customary and popular methods of dealing with legal controversies.²⁰ The Carolinas were among the earliest colonies to adopt the English common law as a rule of adjudication. This was done in South Carolina by the act of December, 1712.²¹

Before, in 1692, the assembly in an address to Governor Ludwell had complained, because "the Palatine Court assumed to

¹⁸ *Ibid.*, p. 237.

¹⁹ Fox Bourne, *John Locke*, p. 238; and Hawks, *History of North Carolina*, p. 182.

²⁰ Chalmer's *Political Annals*, p. 521.

²¹ See Robt. Mills, *Statistics of South Carolina*, p. 196.

put in force such English laws as they deemed adapted to the province; but the assembly conceived that either such laws were valid of their own force, or could only be made so by an act of assembly."²² The proprietors assumed that all laws of England applied to the colonies, but in 1712 they receded from their position by approving the act adopting the common law and such statutes of England as had been selected by Chief Justice Trott as applicable to the condition of the colony.²³ The act of 1712 puts in force all English statutes declaring the rights and liberties of subjects, as well as the common law, except where it may be found inconsistent with the customs and laws of the province. The law concerning military tenures and ecclesiastical matters is especially excepted. The courts are here, as in Maryland, given the power to apply the principles of the common law. In North Carolina the same object was accomplished by the act of 1715, entitled "An act for the better observing of the queen's peace," which declares the colony to be "a member of the crown of England," and provides that the common law shall be in force in this government "so far as shall be compatible with our way of living and trade." The practice of issuing writs is specially excepted. Certain enumerated statutes, such as the statute confirming the privileges of the people and security of trade, the statute of limitations, and the statute of frauds, are also adopted by this act.

From the scanty records of the early days of the colonies we can glean that the proceedings were often very informal. The discretion of the magistrates in inflicting punishment was very wide, as is apparent from the cases cited by Hawks in his history.²⁴

A court of chancery was established as early as 1697, in which the English chancery practice is in the main adhered to.²⁵ At a very early date trained lawyers were in these colonies among

²² Rivers, *Historical Sketch of South Carolina*, p. 433.

²³ *Statutes of South Carolina*, II, 401.

²⁴ Hawks, *History of North Carolina*, II, 122, 218.

²⁵ *Ibid.*, p. 134.

the judges; in the year 1729 we find that on the question of the effect of a general pardon an English case²⁶ is cited and followed in the adjudication, one of the earliest instances where such a use of English authorities can be ascertained.

In South Carolina, the city of Charleston was for almost a hundred years the seat of the colonial court, the source and center of judicial proceedings. This of course was favorable to an earlier reception of the English common law, as a centralized system of judicial administration always leads to a more highly developed form of juristic conceptions. On the other hand this concentration of jurisdiction had the effect of leaving large tracts of the colony virtually without regular administration of the law, so that in the remoter parts of South Carolina associations of regulators had to be formed to deal out a rough popular justice.²⁷

Anthony Stokes, Chief Justice of Georgia, in his *View of the Constitution of the British colonies of North America and the West Indies*, London, 1783, gives a very interesting discussion of the state of legal administration in the southern colonies. He states that the colonies where the system of county courts prevailed, where there were a large number of judges in general unacquainted with the law, little decorum was observed in the courts; but the colonies where the judges of the superior court went on circuit had a more impartial administration of justice. A system of circuit courts, however, was not established in the colonies in the 17th century, except for a short time in Virginia. And the lack of a harmonious, unified, and consistent rule of adjudication may be inferred from the one fact of the absence of a unified judiciary. Of course a system of appeal would tend to unify the law, but in these early days an appeal to a central court was by no means an easy matter, and, in the ordinary administration of justice the citizens undoubtedly took their law from the popularly elected

²⁶ 2 Croke, 148.

²⁷ Ramsay's *History of South Carolina*, p. 120.

magistrates who had no pretensions to a knowledge of technical jurisprudence.

Stokes also discusses the question as to what part of the English common law the colonists had brought along with them.²⁸ His answer illustrates the vagueness and the unhistorical character of the legal theory. He says that the general rules of inheritance and personal injuries were brought along; not, however, the artificial distinctions and refinements of property law, the laws of police and revenue, etc. Now we have seen that the law of personal injuries was usually fixed by the codes which the colonists established at an early date, the rule of inheritance too was in most colonies varied from that of the common law; and certainly an adoption of any system which would leave out property law could be styled an adoption only in a very modified sense of the term.

²⁸ Stokes, *View of the Constitution of the British Colonies*, pp. 9, 10.

CHAPTER IV.

CONCLUSION.

When we come to consider from a more general point of view the attitude of the early settlers toward the common law, we find that certain views of law pervaded all the colonies; that in other matters the various colonies followed their own bent and were influenced by their special conditions or the special purposes of their polities. A general trait of early colonial law is codification. It seems to have been universally considered necessary to state the essential elements of law for the guidance of the colonists who had taken up their abode in a wilderness without books or facilities for legal study, who therefore in the nature of things could not use a system which, like the common law even of that date, necessitated a vast apparatus of technical treatises, of reports, and of statute books. In all the colonies except Maryland we find an early codification of the essential elements of the law. In Maryland, as we have seen, this was prevented by the controversy between the people and the proprietor, but even there considerable legislation was produced at an early date. Some of the codes, like those of Massachusetts and Pennsylvania, departed in many essentials radically from the principles of the common law, and show that their framers consciously desired to meet the entirely novel conditions of the colonists by new and appropriate legal measures. We may safely say that these codes were in the first decades of the colonies almost the sole source of legal knowledge, of rules for adjudication. As to matters not covered by the law here stated, the good and careful discretion of the popularly elected magistrates or appointed judges was relied upon to furnish a just rule satisfactory to the popular sense of right. In some in-

stances we have noticed the use of elementary English treatises on actions, like Dalton's *Justice*, but we have also noticed that while the names of the forms of actions were used, the greatest laxity and informality prevailed in their application and in the general practice of the popular courts.

Some of the colonies declared the English common law subsidiary in cases not governed by colonial legislation at a comparatively early date. We have noted this in the case of Maryland, Virginia and the Carolinas. But other colonies very early made unequivocal declarations of looking upon the law contained in Scripture as subsidiary law in their system. This is true of Massachusetts, Connecticut, and New Haven and to a certain extent of New Jersey. In both cases, however, in the earlier days before a trained bench and bar had come into existence, a declaration of the existence of a subsidiary law would but little bind the otherwise unfettered discretion of the popular judges; because undoubtedly these judges (like the Chancellor in *Marks vs. Morris*, 4 Hening and Mumford, 463) would epitomize the common law in the ancient rule of "*honeste vivere*" and thus apply their own ideas of justice until called to account by a trained bar, which arose later, during the 18th century.

The records that have been examined exhibit everywhere, especially in the popular courts, a great informality in judicial proceedings. The large number of judges in these courts would of itself tend to make the practice informal, to make the trial more like a deliberation of a community by its representatives on the justice or injustice of the case involved. The absence of a jurist class, and especially the universal prejudice against lawyers, proves that a popular and not a technical system was being enforced. The technical knowledge of the lawyer was not demanded, and, like Lechford, the lawyers had to turn their hands to semi-professional or non-professional work, the courts of the colonies at that date having no need of the aid of a trained profession to discover what was the law, as by the custom of the time the law was in so many cases determined by the dis-

cretion of the court. It seems just to conclude that in most cases the administration of law was carried on not according to the technical rules of a developed system of jurisprudence but by a popular tribunal according to the general popular sense of right.

The original elements in the early colonial laws are great in number and import. They foreshadow and anticipate some of the most far-reaching American law reforms. Pleading is simplified, and the intention is in many places expressed that it shall be possible for any man of ordinary intelligence to plead his own cause before the courts. This innovation supports the same conclusions that we have reached from the facts of the institution of popular courts and the absence of trained jurists. Evidence was in many colonies given in writing, or at least taken down by the clerk and made a part of the record in the action; a practice utterly abhorrent to common law ideas, not so to the popular mind to whom the evidence is the most important part of the case. Various modifications of the jury system have been noted, but in general this venerable and highly popular institution was finally adopted in the colonies in its English form at an early date. The period of prescription was in many of the colonies lowered to five or seven years, a change that was of course eminently consistent with the conditions of an infant colony on a new continent. Executions on land were permitted, and in many cases the fundamental distinction between real and personal property in the English law was obliterated or ignored. The laws of inheritance and of tenure were, as we have seen, very materially modified, very often leading to the adoption of a system totally unlike the common law at that period.

The historian will be interested in the reversion to the more ancient customs of the common law which we have ascertained in a number of cases. Such are the bestowal of judicial functions in law and in equity on the councils, protests against the extraordinary jurisdiction of which recall the history of the

jurisdiction of the Great Council and Chancellor in England in the 13th and 14th centuries. We have seen how archaic ideas of the jury were revived; Georgia, even after the period of independence, using a system of controlling the jury that was modelled on the old method of attain. We have also seen how the idea of tort liability for crimes was revived, an idea that has been in the last decades again enforced with new emphasis by our legislatures. But the most important and interesting revival of older institutions is found in the popular courts composed of a comparatively large number of judges, recalling the twelve thanes of early English law, who declared law and custom in a simple, straightforward manner. Men here appear to plead their own causes, unassisted save by the unremunerated help of a friend or by the court itself. The court is not a trained judge, drawing his knowledge from, and supporting his judgment upon the accumulated wisdom of ages of legal development, but a popular committee representative of the people and enforcing the general popular custom and sense of justice.

We have also noted the prevailing views on the nature of law. The analytical theory of Hobbes, making positive law independent of moral considerations and basing it on a sovereign will, was not accepted at that time. The law of God, the law of nature, was looked upon as the true law, and all temporal legislation was considered to be binding only in so far as it was an expression of this natural law. With such a view of the nature of legal obligations, it does not seem strange that the magistrates should look for the true law in their own sense of right and justice, or, in the Puritan colonies, in the word of God.

The views of the common law when expressed are of the most rudimentary and incomplete kind. Ignorance of the system is often most frankly confessed, and when a comparison is instituted between the colonial laws and the common law, *Magna Charta* is taken as a sufficient embodiment and expression of the latter. This is true not only in the Puritan colony of Massa-

chusetts, but also in Virginia where, when it was to be decided whether an act was contrary to the common law, the committee thought it sufficient to examine *Magna Charta*.

Among the early colonists we therefore find a very clear perception of their destiny to work out a new legal system, to establish rules dictated by their special polity or by the conditions of primitive and simple life in which they found themselves. Respect is often expressed for the common law, the resolution is in some cases even formed of using it as a model, but it is only in a few cases clearly established as the rule of judicature and in still fewer instances followed with precision in the ordinary administration of the law. A restatement of the law for the use of courts and people, in the form of brief codes, is everywhere considered necessary. These codes cover the more essential parts of the law, leaving cases therein not anticipated to be decided by the discretion of the magistrates. The theory of the transfer of the common law as subsidiary law at the beginning of the colonies is therefore, in its unmodified form, not a true statement of colonial legal relations. We cannot understand the history of our law, nor justly value the characteristic development of our jurisprudence, unless we note the actual attitude of the earliest colonists towards the common law, an attitude sometimes of apathy, of lack of understanding, sometimes of resistance or ignorance, sometimes, as in the case of Maryland, of admiration and adherence from the first.

It has been said that the colonists imported the general principles, the general system of reasoning of the common law. This is either self-evident or too indefinite to be of any historical value. It is certainly true that ideas of right and positive law develop side by side mutually influencing and reacting upon each other; and in this sense the English colonists, in their general ideas of justice and right, brought with them the fruits of the "struggle for law" in England. But when the expounders of the theory attempt to descend to particular statements of these general principles, they use colorless phrases that might

as well be applied to any other system of civilized jurisprudence as to the common law. And when we apply the theory to the facts, we find that it is not a true and complete statement of the basis of jural relations in the early colonies.

Most of the colonies made their earliest appeals to the common law in its character of a muniment of English liberty, that is considering more its public than its private law elements. In the 18th century, with a more jealous supervision of colonial development by the mother country, the introduction of law books, and the growth of a trained bench and bar, a more general reception of the private law principles of England is brought about.

Careful study of the early peculiarities of our system is necessary for an understanding of the juristic history of our various commonwealths and of the nation as a whole; a knowledge of the facts revealed by the documents will enable us to see the true nature of the adoption of the common law of England as a subsidiary system. It will permit us to recognize from the first in our history an originality of legal development which the accepted juristic theory tends to obscure.

To state the final conclusion arrived at: The process which we may call the reception of the English common law by the colonies was not so simple as the legal theory would lead us to assume. While their general legal conceptions were conditioned by, and their terminology derived from, the common law, the early colonists were far from applying it as a technical system, they often ignored it or denied its subsidiary force, and they consciously departed from many of its most essential principles. This is but natural; the common law was a technical system adapted to a settled community; it took the colonies some time to reach the stage of social organization which the common law expressed; then gradually more and more of its technical rules were received.

The object of this thesis has been to show the points of departure; it remains to trace the history of the gradual adoption

of the common law in practice and its amalgamation with the original elements of American colonial law. American jurisprudence has three sources: (1) original institutions and legal ideas developed by the colonists in response to the demands of their novel situation; (2) principles and institutions derived from and modelled upon Scriptural authority, (3) the principles of the older English law; the former are not sufficiently emphasized by the accepted legal theory. From the first our law had a large element of originality and gave evidence of creative power.

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